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FEDERAL REPUBLIC

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INTRODUCTION

The federal Republic of the United States of America has been in existence under the present Constitution for 136 years. The organic law has been amended nineteen times—twelve times in the first 17 years, three times just after the Civil War (1865–1870), and four times recently within a period of 11 years (1909–20).

The first twelve amendments were all to intents and purposes part of the original Constitution—eleven were a bill of rights as against the federal government—limitations on its powers in the interest of the states and of the people individually—the twelfth added no power to that government.

All the remaining seven amendments have added to the power of the federal government at the expense of the states —either depriving the states altogether of certain powers, or vesting in the federal government concurrently with the states powers theretofore belonging to the latter only.

There is a long series of acts of Congress which have assumed for the federal government powers by no means expressly delegated in the Constitution, and in some cases distinctly supposed by the framers of that document to have been unquestionably withheld. The doctrine of implied powers, in itself logical and necessary no doubt, has been strained to the extreme; while such an act as that giving Congress the power to make paper currency a legal tender, is flatly contradictory to the deliberate intent of the Constitutional Convention. Many of these acts have been sustained by the Supreme Court by a divided vote—whereas in the few instances in which by such vote the Court has held an act of Congress invalid under the Constitution there has at once

been loud clamor against justices who have presumed to do their duty as they have seen it.

The essence of the Constitution is the federal balance—the central government having certain powers which seem necessary for the general good, certain other powers being forbidden to the federal government or to the states, or to both alike, and the states retaining all not wholly delegated or forbidden.

Since the War of Secession, however, the national consciousness has been greatly intensified, and the states, many of them quite new, have lost materially in state pride and tenacity. The drift towards centralization, both by direct change in the Constitution and by encroaching federal legislation, has gone so far as to endanger the vital principle of the republic—the principle of large local freedom from central control. To trace the motives and methods by which so much has been lost and so much more seems likely to be lost, is worthy of careful observation. We should realize some of the results which are threatening. This discussion is offered as a contribution towards such a study.

The volume of Professor Herman V. Ames contains a list of proposed amendments to the Constitution for the period 1789–1889.

By the courtesy of the officers of the Division of Bibliography of the Library of Congress the author has been furnished with a list of amendments offered in both Houses of Congress from 1889 to 1923. The texts of joint resolutions for amendment introduced in Congress from 1921 to 1925, have also been provided by the Division of Bibliography, and with the further generous aid of the Hon. Martin B. Madden and the Hon. Morton D. Hull.

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OUR FEDERAL REPUBLIC

CHAPTER I

THE FEDERAL EQUILIBRIUM

The Federal Republic

THE vital principle of the constitutional system of the United States of America is the existence of the republic as a successful federation of states.

The Constitution was enacted by the people—"We the people of the United States do ordain and establish this Constitution." But the people cannot act unless in some definite way of organization, and adopting the Constitution the people acted as organized in state groups. In other words the Constitution as law was created by the states.

"Sovereign States"

"Sovereign States" they have been called at times. Strictly speaking they are not sovereign. Whatever may or may not have been the status of the original states in that respect they ceased to have any claim to sovereignty when they ratified the Constitution—and the states which have been admitted since, aside from Texas, never were sovereign at all.

A state—an organized body of people residing in a given territory—is sovereign if it has no legal superior and if it has within itself complete legal authority. But every state in the Union is subject to the final legal authority of the states collectively, acting by three-fourths of their number. It is in this way that the fundamental law of the Union may be changed, and any change thus adopted is legally binding on every state. The United States of America, then, is a sovereign state, as it has no legal superior, and as it has

complete legal authority within its borders. But each one of the states is subject to the authority of the United States and hence no one of the states is itself sovereign.

Sovereign Powers

Sovereign powers are those usually exercised by a sovereign state, over its own people or with reference to other states.

The organic law of the United States makes a threefold distribution of such powers.

Some are delegated to the federal government—and that government has no scrap of legal power not thus granted in the Constitution, either expressly or by necessary implication.

A great body of powers not vested in the federal government is reserved to the states. These numerous powers are those which the states use in their active and abundant political life.

The third group of powers not granted to the federal government and not reserved for the states, are withheld by the people of the United States, and can be exercised by them only by the process of amending the organic law. Both the federal government and the states are forbidden to pass any bill of attainder or any ex-post facto law, for instance. The United States, the sovereign authority, could provide for such legislation, but only by authorizing an amendment of the Constitution. In fact, the states collectively, acting by the agreed ratio of three-fourths of their number, may alter the distribution of powers at will—may assign to the federal government or to the states separately powers now withheld from either—may transfer to the federal government powers now reserved to the states separately, or the reverse—may vest in the federal government and in the states separately any power to be exercised concurrently by these two agencies—may withdraw from either any power with which it is now vested.

To repeat, the sovereign, whose will embodied in law is supreme, is the Union of States, that is, the states collectively, acting by an agreed ratio, three-fourths of their num-

ber. The sovereign is not the people of the United States in mass—it is not any one state acting by itself. In forming the Union under the Constitution each ratifying state parted finally with its sovereign authority, surrendering it to the Union of States to be exercised by the agreed ratio. The states separately may be called sovereign, then, only in the sense that in the distribution of sovereign powers the states separately are agencies of the sovereign—the Union—for the exercise of a great mass of the powers of government which may be exercised by the sovereign either directly or by delegation. In the strict sense of the term no state by itself is sovereign.

"The New Nationalism"

President Roosevelt developed a theory of the republic which he called the new nationalism—a theory very interesting but hardly accurate.

Lindsay, 44 Am. Law Review, 641

His view was that with the passage of time there appeared what might be called a twilight zone of sovereign powers—powers not delegated to the federal government in the Constitution but yet quite essential to the national life, and powers not appropriate to the states, powers exercised by other sovereign nations; and that such powers then from the necessity of the case should belong and do belong to the national government.

The weakness in the theory is not far to seek. It is clear enough that new conditions constantly arising may make such a twilight zone of power apparent—it may well be that these powers might most advantageously be vested in the national government. But the only valid conclusion from the emergence of such a situation is that the powers in question belong as a matter of course to the United States, but not to the federal government until and unless delegated to that government by the United States—that is, by the union of states acting in the constitutional way.

President Roosevelt failed to discriminate between the United States as the sovereign authority, and the govern-

ment of the United States, the federal government. The latter is the United States only in the sense that it is an agent representing the sovereign authority.

The United States has all the sovereign powers that belong to any independent nation. But it by no means follows that it has intrusted any specific one of those powers to its federal government.

Our republic, in short, is a federation of republican states.

Its governmental system is not centralized, like that of the French republic. In France the departments are creatures of the central government, and are its agencies for governmental purposes.

Our federal government is the agent of the Union of States for specified governmental purposes—and for no other.

Our states, within their Constitutioned sphere of reserved powers, are wholly independent of the federal government.

Each state decides on its own structure of government and on the distribution of powers therein, and the federal government has no power to interfere—save only that the state government must be republican in form (U. S. Const., Art. IV, Sec. 4, § 1).

Each state decides for itself the laws of land tenure, and the federal government has no power to modify these laws—even if they affect national or foreign powers.

California Statutes and Amendments to Code, 1923, p. 1020, sqq.

California withholds from aliens not eligible to citizenship under the laws of the United States, the right to hold real property except as specified in any treaty with the United States.

Illinois Revised Statutes

Illinois permits aliens above 21 years of age to hold real estate for six years only.

Criminal law

Each state makes and enforces its own criminal legislation, while the federal government within state areas is confined in this field to such offenses as are in violation of federal laws. States may differ and do differ in the definition of crimes and in penalties on conviction.

In 1839 the Governor of Virginia demanded from the Governor of New York the extradition of certain persons within the jurisdiction of the latter state who were alleged to have connived at the escape of slaves from Norfolk in a vessel which conveyed them to New York. Such an act would be in violation of the laws of Virginia. The Governor of New York declined to honor the requisition on the ground that the act in question was not a crime under New York law. This was a matter wholly between Virginia and New York. The federal Constitution (Art. IV, Sec. 2, § 2) does provide for interstate extradition of fugitives from justice, but as there is no provision for federal intervention in case extradition is denied it remains a state matter, and no state is obliged to adjust its criminal statutes to those of any other state.

Hammond, II, 520–1

The federal government has no power by unilateral act to lessen the territorial limits of any state—no state can be divided without its own consent. (Art. IV, Sec. 3, § 1.)

Division of a State

The admission of West Virginia (Dec. 31, 1862), an apparent exception, received the assent of what purported to be the legislature of Virginia, and thus the forms of law were regarded. Further, this was a transaction due to civil war.

West Virginia Thorpe, III, 31

Many people of Maine and those who sympathized with them held that the treaty of 1842 between the United States and Great Britain, whereby the northeastern boundary was determined, was in excess of federal power as ceding to Great Britain a part of the soil of the State of Maine. In fact, however, the soil in question was not an uncontested part of Maine. The treaty did not cede land to Great Britain—it determined what was and what was not lawfully American soil—what was Maine and what was not Maine.

Maine

Alaska at this writing is not a state, but is property of the United States. It would therefore be in the power of the federal government to divide it—as indeed has often been done with territories—or even to transfer it—in whole or in

Federal Cession of a Territory

part to a foreign power. But once Alaska becomes a state such federal power vanishes.

There are merely a few of the well known cases of sovereign power reserved to the states.

Powers Delegated

In forming the federal Constitution the states created a federal government and vested it with important sovereign powers, but by no means with all. Outside the sphere of such powers with which the states have parted they remain wholly sovereign—supreme within their own field—exempt from any interference by any other state or by the federal government of all the states. The republic is "an indestructible union of indestructible states" (Texas v. White, 7 Wall, 700).

A Union of Pre-existing States

Again, the federal republic is by no means an artificial federation—composed of an area arbitrarily divided. It was at the outset a voluntary union of preëxisting units, each with its own vigorous economic, social and political life. The admission of new states does not alter this situation. New states enter the Union by consent of the federal government, to be sure, but always on their own application—indeed usually a very strenuous urgency comes from the people of the would-be-states. The republic is a real union of quite separate entities.

Advantages o Federation

A successful federation is perhaps the best form of government that has yet been devised. Its great advantage lies in the recognition of variety of opinion and policy in public affairs—in willingness to allow different localities freedom in managing their own matters—in short in the definite establishment of local self-government.

Intolerant centralization implies that there is only one way in which communities should carry on an orderly public life, and this way is forced on all without regard to difference of views or of desires. But experience has shown that really there are many ways in which people can live together and can manage their common affairs. Some of these may be better than others, but if the people of a given locality prefer to

get on with what may perhaps be an inferior method, but which they really wish to retain, it is usually better for them to have what they want than to have forced on them from without what might abstractly be better but which they do not desire at all.

The accidents of settlement and of local avocation made it convenient for the people of Massachusetts to gather in rather small local groups, whose members were close together and who could therefore meet easily for the settlement of their common affairs; hence the town meeting as the basal unit—and a purely democratic unit—of government. Quite other accidents of original settlement and of economic occupation made it more convenient for the people of Virginia to manage what they had in common in larger areas and by a different method. The county thus became the distinctive governmental unit. What did or does it matter to the people of Massachusetts how Virginia is locally organized, and what do Virginians care if Massachusetts Yankees prefer the town meeting? Each state under our federal system may do quite as it pleases in such matters.

In a land of vast areas and great population and also of wide diversity of climate and industries and mode of life, it is especially desirable that each state should be free to live its own life in its own way, so long as it does not meddle with the freedom of its sister states.

Local Self-Government within the States

Within the states the principle of local self-government has gone far. The people of the state as a whole are supreme, within the limits of a republican form of government, and subject to the constitutional federal powers, and have a very wide range of choice as to the distribution of their own governmental functions. The tendency has been more and more to delegate to organic localities a large competency in their local affairs.

New York

The constitutional history of the State of New York affords a good illustration in point. By the first constitution of that

state there was constituted at the capital a council of appointment, consisting of the Governor and four Senators, one from each of the four senatorial districts into which the state was divided. This council was vested with the power to appoint, not only all officers of state wide jurisdiction, like the attorney-general and the state treasurer, not only all judges, but also such local officers as justices of the peace, mayors of cities, surrogates and county clerks.

The second constitution of the state (1821) abolished the Council of appointment and distributed the appointing power, making many local offices elective—but the mayor of New York City was still appointed from Albany until the amendment of 1827 was adopted.

City Charters

So far has this devolution of power gone in some of the states that the charter of a city, which legally is a grant from the whole state, may be drafted by a city convention. In most cities, too, the local police force and its control are made a municipal function—and this in spite of the fact that the maintenance of public order is primarily a function of the state.

Local Unit Self-Government

In most of the states local units, county, city, town, village, are vested with the control of their own affairs to a very large extent—education, public health, assessment and collection of local taxes, for instance. Of course the state retains general jurisdiction—may alter in one way or another any of these local grants of authority—may make local officials agents of the state for specified purposes. But the whole tendency from the first has been rather steadily in the direction of more and more local self-government.

This is on the whole desirable so far as matters are concerned which primarily affect the locality only, and of course presupposes that the locality is competent to administer such matters. There is inevitably in such grant of local powers some admixture of control over affairs of more than local interest. A local road may lead somewhere else, the ill health

of a small community may endanger large areas outside its boundaries, defective education will tend to produce citizens of the state whose ignorance is itself harmful. But with these dangers real statesmanship must deal. The presumption, at least in a reasonably intelligent and orderly citizenship, is in favor of local freedom. The burden of proof for a course of departure from such local liberty is on those who propose it. Still, if cause can be shown, the state must keep its authority. Thus the local police may do for the usual preservation of order. But special conditions may make a state constabulary quite necessary—as some states already have found.

Some Reasons for Home Rule

The reasons for local home rule are clear enough. Most of the business relates really to no one else but the local community in question. If it involves taxes, these taxes are self-imposed, and the tax payers not merely have a direct voice in voting the money but also a direct voice in the way of spending it. The likelihood of economy and efficiency therefore is greater than if all came from without. The power of the purse is essential to a free government. Nothing is clearer in history than waste and corruption in the use of public funds when those who spend are not immediately responsible to those who pay. The farther the power to lay taxes is removed from those who pay taxes, the heavier the tax burden almost inevitably becomes and the less benefit the community gets from it.

Moreover in a democratic state it is clear that people should become habituated to take part in government as much as possible. There will always be those who are quite willing to save people the trouble—but whether the people get the benefit is another question. Actually sharing in government of a locality is an education in public affairs which a democracy needs. Local self-government is of the essence of political democracy.

A federation of states, then, implies a large measure of home rule for each state—and in our republic this home rule is not

State Home Rule the Essence of Federation

granted by the federal government, but never belonged to the federal government at all. In the republic the states collectively are grantors of powers and the central government is the grantee. Within the state, the local unit is the grantee, and the state is the grantor. The state is the unit of government—it has divested itself of powers to the federal union which it can resume only with consent of a large proportion of its fellow states—by the orderly process of constitutional amendment. Any powers which a state may grant to one of its own local units the state may reclaim at will. But in either case the whole body of governmental powers resides in the states, either individually or collectively. No city or county has any governmental power which it has not derived from the state of which it is a part. The federal government has no power which it has not derived from the states acting together. The states enacted the Constitution of the United States by a two-thirds majority (nine out of thirteen). The states enact all amendments to that Constitution by a three-fourths majority.

"Blue Sky" Federal Appropriations

The more active part the people take in their own local affairs the clearer their conception becomes of the true functions of government, and the less likely to form hazy ideas of it as something remote, extraneous and quasi-providential. In all our history there has been a notion, more or less well-defined, that "the Government," as many have become accustomed to designate the Washington authorities, should be a sort of general providence, looking out for the prosperity of individuals as well as guarding them from harm. Appropriations from the general treasury for local or individual use—a pension for an old soldier, the improvement of navigation in an alleged river, the distribution of public funds to encourage education or the applied sciences—these appropriations seem to many to be gratuitous provisions of beneficience coming from the blue sky. That the federal treasury has no funds except those paid by the people in some form of tax, direct or

indirect, that the payment of these taxes is not merely a drain on personal resources but also invariably leads in some way to a higher cost of living for all, is not always realized. It is highly desirable that there should be a clear and obvious relationship between governmental income and governmental expenditure—the route of public funds from the taxpayer's pocket to this disbursement should be luminous. For these reasons federation should leave vested in the states as many public functions as consistent with national security, and the functions and cost of the central government should be kept at a minimum of necessity. Federation makes this quite possible.

Elasticity of Federation

A successfully constituted federation should be a very durable system of government because of its very nature it is more elastic than a consolidated system and less likely to lead to general discontent. The different states may easily try very different political and social experiments, without committing the whole country to any of them. If other states see fit to follow, they may do so. Otherwise, there is room for difference of policy and varied opinion. Such devices as the Australian ballot, limitation of expenditure in elections, the direct primary, the referendum, woman suffrage, prohibition of intoxicants, laws of the family relations, and many more, without exception have been taken up first by separate states, and their experience has been followed with interest and in many cases by imitation, on the part of other states. But the clash of opinion has acted in but one state at a time—each one is free to follow its own will without interference from others—the strain therefore is distributed and this elasticity of structure and of function is of inestimable benefit to the security of the whole republic.

The value of local self-government and the very great importance of it as an elastic device for the better security of the whole empire was not understood by the British government in the eighteenth century. It was the attempt at the execu-

The American Revolution Came from Failure of the British Government to Understand Local Autonomy

tion of centralized power over remote and practically unrepresented colonies that brought a resistance which ultimately resulted in the disruption of the British colonial empire. The lesson was ultimately learned and the British Commonwealth to-day has populous self-governing dominions which live freely each its own separate life. This Commonwealth is substantially a federation, with characteristic British indefiniteness of legal form but also with equally characteristic British solidity in substance. A distinct act of parliament provides for each dominion, with no attempt at imperial unity of structure such as is found in the Constitution of the United States. But the federal life and principles are there in full force.

It could hardly be expected that George the Third and his ministers should have had the wisdom of which their own bungling and sad experience was perhaps the beginning.

It was impossible for our own cotton states of 1860–61 to realize in advance the lessons of a half century after that fatal year. It was equally impossible for the British ministry of 1774 to profit by the travail of a full century following. But it certainly is cause for regret that in each case there was not at least a little more light and much less heat—there were those, like Chatham and Robert Lee who had the vision.

Difficulties of Federation

While the federal system has so many advantages it cannot be denied that it is peculiarly difficult to establish and to maintain.

The Constitution of the United States was adopted only reluctantly and with much opposition by the original thirteen—it was "extorted by grinding necessity from a reluctant people." The states had to yield certain sovereign powers—and that they disliked intensely. The large states did not relish granting away the powers inherent in their size and wealth in the interest of their small and weak neighbors. The small states were very jealous and apprehensive of their future relations in a federation with the great states. Massachusetts did not wish to be governed even in part by Rhode

Island, while Rhode Island was in fear of the dominance of Massachusetts.

Too Much Federal Power Feared

However, the states were confronted with a prospect little short of anarchy if federation failed, and the experiment was tried. Even then there were two states which did not come in at the outset—Rhode Island and North Carolina—and so many modifications of the Constitution (189 in all) were urged by the states that one of the first acts of the federation under the Constitution was to enact the first ten amendments. Fear of excessive federal power was what led to most of the suggestions for these amendments. They are of the nature of a bill of rights for the people and for the states as against the federal government.

Too Little Federal Power under the Old Articles of Confederation

Fear of excessive power in the central government was what led the states to hesitate in their adoption of the federal compact. But federation may easily fail if the central government has so little power as to be impotent. That is exactly what happened with the agreement of the states which preceded the present Constitution—the Articles of Confederation. Under that frame of government the central power was practically helpless and the situation was such as really brought the new republic into international contempt and was leading to political chaos.

The Constitution Adopted by the Process of Revolution

So desperate was the situation that in their alarm the new frame of federal government was adopted by a process which was virtually a revolution. The Articles of Confederation could be amended only by unanimous consent of all the states. It was provided in the proposed constitution that it should go into effect when approved by nine states—in fact it was put into operation by eleven, the other two being disregarded. South Carolina was not the first secession state, therefore—the eleven really seceded from the old Confederation and set up a new government of their own.

The thirteen colonies seceded from the British Empire in 1776 and established the success of their secession by force of

Three Processes of Secession in American History

arms. The eleven states seceded from the thirteen in 1789, and obviously needed to exert no physical force in order to secure their independence from the Articles. South Carolina and her Southern colleague states attempted secession in 1860–61, but failed to establish their independence by military force. But the three secessions were not very different in principle.

The Essential Equilibrium

The success of a federation depends, then, on the establishment of a safe equilibrium between central power and local state power. Such equilibrium is by no means determined by any metaphysical theories, but is wholly a practical question, depending on facts, to be sure, and on the human equation as it is. It implies mutual concession. Perhaps it would be better for all if certain matters were made subject to central control, but in the end, on the other hand, it may easily be that the people as a whole are not ready for such uniformity of law and its enforcement. Then it is wiser to wait for the slow unfolding of popular intelligence and conscience.

Slavery in the United States

Slavery as it existed not many years ago in many of our states was not a desirable institution, to say the least. But its legal existence, before the civil war, certainly was in the sphere of state rights, and the federal government had no constitutional power at all to meddle with it. At that time there can be no doubt that the overwhelming opinion in non-slave holding states was to the effect that slavery ought sooner or later to pass away; that such change should be brought about by the slave-holding states in their own way and in their own time; but that in the territories of the republic it was wholly lawful and in every way desirable that slavery should be prevented.

Had this view prevailed there would have been no civil war. In due time provision would have been made for gradual and compensated emancipation, as had been the case in other parts of the world. The frightful destruction of life and

property which the civil war entailed, and the almost equally demoralizing chaos of reconstruction, would have been prevented. There were in the way, however, two forces which turned out to be irresistible. The extreme abolitionists believed slavery to be a sin against the moral law and that it should be abolished, immediately, totally, and without compensation. If the Constitution stood in the way, so much the worse for the Constitution. On the other hand the far more powerful extreme pro-slavery extensionists believed slavery to be morally right and economically desirable, and insisted that it should be extended throughout the federal territories and in the states which should come from them. There was not political wisdom enough in the republic to prevent the conflict of force. Slavery was kept out of the territories and abolished in the states, but this great reform was brought about in the worst possible way and at enormous cost not merely in blood and treasure but in the national morale. Sound judgment and enlightened patience were sadly lacking—and it was a costly lack.

The Dangers to any Confederation

An enduring federation is not easy to form, as the American experience makes plain, and being formed, a federation is difficult to maintain.

A Federation too Loose is Unstable

If the equilibrium between central and state powers is not securely established of course dissolution is likely to come about rather soon. The American Federation under the Articles lasted eight years. The Holy Roman Empire kept its form for ages, but the members of the Empire were practically independent states through great part of that time. A weak federation is little more than an alliance—and alliances are notoriously apt to be short-lived. The American federation under its Constitution of 1789 was able to form "a more perfect union"—in other words it was put in a condition of stable equilibrium. The crucial test of stability came in the attempt at secession in 1860–61, and the stability was made enduring by the shock of armed conflict.

A Federation May Become in Fact a Centralized State

The converse to the dissolution of a loose federation is its transformation, perhaps quite gradually, into a centralized state. The federal form may perhaps be kept long after the real federal equilibrium has vanished. This may be considered as the exact opposite of the status of the Holy Roman Empire, which kept the federal form, to be sure, but with central power in reality atrophied. Local self-government loses its essential powers in a centralizing federation—forms have little meaning when real power is gone.

In other words a federation is always between the Scylla of excessive localization of power and the Charybdis of excessive centralization of power.

Limits of Self-Government

What are the safe limits of self-government, whether within a state, or for the state of a Federation?

Within a state it is a safe doctrine that any organized locality should manage all affairs that have no material import beyond its own borders. Such localities lay and collect their own taxes, take care of their own poor, and of destitute sick, look out for public health, see to paving and lighting the streets, provide schools, and the like—in varying proportion as the locality is county, city, town or village. Public order and to a greater or less extent public justice are also held local matters.

But clearly sometimes these subjects are of much more than local interest. Public health is essential, for a pestilence caused by local ignorance or inefficiency has little heed for political boundaries. It is of wide concern that life and property be safe everywhere, and local indifference to education may be a source of danger to the whole commonwealth. The examples of such defects in local intelligence and firmness in the cause of the general welfare are too many and too well known for specific mention here. When emergencies of sufficient moment become clear then it is time for the state to intervene—the locality has forfeited its right to exclusive self-management.

Self-government within a state, then, is by no means a fundamental and inalienable right. It is a grant from the state at large, to be given or withheld as the state may deem wise. In other words it is a trust from the state to the local community—a trust that may lawfully and equitably be held forfeited by misuse.

Self-Government of States

The local self-government of states in our federal union, so far as the federal government is concerned, and subject to the limitations of the constitution, is exempt from external control. Of course this is to be qualified only by the sovereign authority, not by the federal government, but by the Union of States as a whole, which may, by three-fourths of their number, divest states of any of their reserved power. This has been done more than once—for example in the fifteenth and eighteenth amendments—the former took from the states a power of limiting suffrage which theretofore had been used frequently; the latter deprived the states of a portion of the police power and of the taxing power, relating to intoxicating beverages, which had been universally enjoyed until the amendment was adopted.

The Federal Equilibrium

Within the limits of their constitutional reserved powers the states are free from interference by the federal government. It is the balance of this government with the states that is so essential to the perpetuity of the federal system—it is this that forms the federal equilibrium.

CHAPTER II

THE FEDERAL BILL OF RIGHTS

Government Means Control

Government implies control of the people, and almost invariably its tendency is to extension of control. In other words those who are intrusted with power usually are apt to seek more power, while tenaciously holding on to what they have.

Tendency to Transform the Purpose of Government

Governmental control is necessary for public safety, from dangers external and from dangers internal. But officials, who are agents of the people for public service, find the emoluments of power very desirable for their own personal benefit and gradually the service of the people imperceptibly shades into the service of the officials as the chief end of office.

The history of governments, therefore, recounts a series of struggles at reorganization for the public good and then of struggles for relief from official exactions.

In short, the inevitable tendency of government is in the direction of tyranny, i. e., government of officials, by officials, and for officials.

Officials who are appointed naturally incline to act so as to meet the approval of the appointing power, in order to secure a long tenure of office. Those who are elected usually look first of all to the satisfaction of those who are likely to influence popular votes. Whether in either case the public welfare is attained tends to become a secondary question. If that welfare is first in the mind of the higher official, or of the organized electoral influence, then the legitimate end of government is attained. But governments everywhere give evidence that public trust is often subordinated to private

interest. This is merely to recognize human nature as it has appeared through the ages.

Medieval Origin of Charter Rights

The turmoil of the dark ages in Europe made it easy for the strong to oppress the weak. Life and property—and property is the sustenance of life—were at the mercy of ruthless men who were armed and even temporarily united. Union for plunder may not be enduring, but in any event the defenseless are sure to lose.

When some order gradually emerged from the general confusion it took the shape usually of a vigorous leader gathering a following and defending his people by the strong arm. Thus for their own safety families clustered around the leader's stronghold—they gave service and received protection.

But the protector was often the robber of others and generally took toll from his own followers without stint. Still that situation was better than that of a folk protected against no one. As this tolerable condition of safety encouraged agriculture and commerce, communities grew up to comparative prosperity, manufacturers and trade flourished, and society began to save the products of industry to the increase of comfort and even of luxury.

But commercial towns, walled and armed for their own defense found themselves under the protection of some overlord who, as we have seen, felt free to tax the new prosperity, nominally for the cost of his guardianship, but often really for his own purposes. The increasing burden of such taxation, with other inconveniences of arbitrary power, led commercial communities to use their own now considerable resources to extort from the lord remissions both of fiscal and of personal impositions. These remissions were embodied in formal documents of grant—charters—actually compacts between ruler and ruled.

The privileges granted in these charters varied widely in origin and content. Some had been customary for ages and were confirmed by grant from the overlord. Some were added

in particular cases as already existing elsewhere. Some were granted by nobles, some by ecclesiastics, some by the crown. Some were extorted by violence, some were purchased, some were granted to secure political aid, as at times in France when the king bought the aid of the townsmen against the nobles.

Having been granted on parchment the charter rights were by no means always secure, and in many cases there was a long history of turbulence in their defense, and a continuing number of confirmations of charters previously granted.

The history of communes, towns and cities of Europe, then, exhibits a series of civic rights embodied in legal acts of grant by a specified authority, of attempts to add to these immunities and of struggle to maintain them.

Magna Carta

Stubbs, Const. Hist. Eng., Vol. II, § 155.

The great charter of King John of England (A. D. 1215) was a legal recognition on the part of the crown of preëxisting rights of his barons, of the church and of the common people, and a solemn agreement not to infringe them. The various rights of the several parts of the nation were carefully enumerated.

Macy, 487

Guarantee of Magna Carta

But here as always when a charter had been given it was realized that a sanction must be provided, and the barons were authorized to select twenty-five of their number with legal power of enforcement.

Essence of a Charter

Here we have the essence of all charters and of all similar documents—an enumeration of rights conceded by a specified authority, an agreement by that authority to respect these rights, and a provision for enforcement in case of failure to keep faith.

It is the last which is perhaps the most difficult. As time passes in one way or another the security of rights slips away and there must be a perpetual struggle to restore those lost or to maintain those still preserved.

"For eighty years from the 'parliament of Runnymede' the history of England is the narrative of a struggle of the nation

with the King, for the real enjoyment of the rights and liberties enunciated in the Charter, or for the safeguards which experience showed to be necessary for the maintenance of those rights."

Stubbs, Const. Hist. of England, II, 1

In the long history of the contest for liberty in England there were times when the people on the whole acquiesced in extreme power of the Crown, as under the Tudors, notably in the time of Elizabeth; while at other times opposition reached as far as rebellion and revolution. Nearly the whole of the seventeenth century was filled with the contest between the Stuart Kings, who claimed to reign by divine right and sought practically autocratic power, on the one hand, and the parliament, acting for the people in defense of their ancient rights, on the other. One Stuart King was beheaded and his last successor dethroned and driven into exile. The triumph of the people was embodied in that great state paper, one of the landmarks of the British Constitution, the Bill of Rights of 1689.

The English Bill of Rights—For Text see Macy, 508

This great document contained no new principles, but merely enumerated the violations of what the parliament regarded as established law of which the Stuart Kings had been guilty. But the difficulty which had always attended the actual exercise of rights recognized in a charter of liberties, as was the case with Magna Carta, was also faced by the parliament of 1689. In that and succeeding years a series of enactments and of precedents secured the rights of the people against usurpation by the crown for all time. The succession to the throne was fixed by act of parliament, thus destroying as a practical force the doctrine of inheritance by divine right. The necessity for annual parliaments to vote taxes cut up by the root the possibility of a standing army to enforce the king's policies. The system of cabinet responsibility to parliament, which gradually developed after the final overthrow of the Stuarts, substantially ended the power of the crown to control legislation.

The English Bill of Rights, then, enumerated the rights of the people as against the crown, and the sanction of these rights was found in no one measure or mechanism, but in a number of separate means, results of later experience.

English Colonists in America

The English Colonists who settled on the coast of North America in the seventeenth and eighteenth centuries were fresh from the long contest to maintain time honored rights of the people against the usurpations of Stuart Kings. Many settlers came in the midst of that struggle, at times despondding of popular success. At all events, whether the Colonist was roundhead or cavalier, he was quite familiar with the questions at issue, was keenly aware of the privileges guaranteed by the Bill of Rights, and sooner or later he or his successors knew well how to claim such rights should they be in jeopardy.

The political history of most of the Colonies, too, showed a continual difference of opinion between the people represented in a legislative body and a governor appointed by the crown. Thus the people learned to distrust the royal policies and to claim their rights as granted in their own charters given by the crown. The great charter of King John, the Bill of Rights of 1689, and the various Colonial Charters, were familiar to the Colonists, then, as the legal basis of their liberties.

Distrust of Legislative Bodies

But after the peace of Paris in 1763 the influence of the crown on parliament led to legislation by that body which the American Colonists held to be subversive of their established liberties. Ten years of resistance by peaceful means and eight years of war ended in the severance of legal relations between the British government and the Colonists. The united colonies became the independent United States of America. But these eighteen years had habituated the Americans to apprehend encroachment on their liberties not only from a royal master but quite as much from a legislature. To be sure the British legislature was far away and had no colonial repre-

sentatives. Still the idea that a legislative body—any legislative body—might easily be dangerous to liberty was firmly lodged in the minds of the people of the states.

New State Constitutions 1776 sq.

In the absence of royal governors when there were such, and in any case in the absence of royal authority, it became necessary for the states to establish each for itself a complete frame of government. In some cases the existing charter with very slight changes was all that seemed necessary. Rhode Island continued to act under the charter of Charles II, granted in 1663, until 1842. Connecticut continued its charter of 1662 as the fundamental law of the state until 1818. But in 1776 eight of the states adopted definite Constitutions, followed by New York and Georgia in 1777, and by Massachusetts in 1780.

State Bills of Rights

In these state Constitutions distrust of their own legislative bodies was clearly expressed in some cases and implied in others. Georgia entrusted to its legislature the power to make laws and regulations "provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution" (Art. VII). The Constitution of New York recited (Art. III) that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and inadvertently passed," and therefore entrusted a qualified veto to a council of revision, consisting of the governor and the principal judges. Several states (Massachusetts, Connecticut, New Hampshire, Pennsylvania, Maryland, Virginia, North Carolina and Georgia) embodied in their fundamental law a more or less definite bill of rights, thereby putting legal restrictions on the powers of their legislative bodies. In later years,—New York in 1821, New Jersey in 1844, Rhode Island in 1842, Delaware in 1792, South Carolina in 1790—the remaining states adopted new Constitutions each embodying a specific bill of rights.

While Connecticut continued until 1818 to operate government under its old roval charter, still in 1776 that state

adopted a bill of rights as a separate act. The act is perhaps worth quoting in full:

Bill of Rights of Connecticut, 1776. Poore, 1, 257–8

"An Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and Securing the Same.

The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties. And forasmuch as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every man in his Place and Proportion. without Impeachment and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.

PARAGRAPH 1. *Be it enacted and declared by the Governor and Council, and House of Representatives, in General Court assembled,* That the ancient Form of Civil Government, contained in the Charter from *Charles* the Second, King of *England,* and adopted by the People of this State, Shall be and remain the Civil Constitution of this State, under the Sole authority of the People thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, Sovereign and independent State, by the Name of the *State* of *Connecticut.*

2. *And be it further enacted and declared.* That no Man's Life Shall be taken away; No Man's Honor or good Name Shall be stained; No Man's Person Shall be arrested, restrained, banished, dismembered, nor any Ways punished: No Man Shall be deprived of his Wife or Children; No Man's Goods or Estate Shall be taken away from him, nor in any Ways indamaged under the Colour of Law, or Countenance

of Authority; unless clearly warranted by the Laws of this State.

3. That all the free Inhabitants of this or any other of the United States of *America*, and Foreigners in Amity with this State, Shall enjoy the same justice and Law within this State, which is general for the State, in all Cases proper for the Cognizance of the Civil Authority and Court of Judicature within the Same, and that without Partiality or Delay.

4. And that no Man's Person Shall be restrained, or imprisoned, by any authority whatever, before the Law hath sentenced him thereunto, if he can and will give sufficient security, Bail, or Mainprize for his Appearance and good Behavior in the mean Time, unless it be for Capital Crimes, Contempts in open Court, or in Such Cases wherein Some express Law doth allow of, or order the same."

The Bill of Rights of Virginia, 1776. Poore, 2, 1908–9

In Virginia a Bill of Rights was adopted first, June 12, 1776, and a Constitution of Government followed as a Separate Act, June 29, 1776. Principles of popular liberty, opposition to hereditary official station, and familiar doctrines from the English Bill of Rights, were embodied. Freedom of the Press and religious liberty were expressly asserted.

A significant section is the Fifth: "That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct."

There is here a plain implication of doubt as to the legislature, as well as of the executive, and in the sanction of frequent change of representatives was provided the only remedy as yet clearly in mind.

Restriction of Legislative Powers in the States

Bills of Rights were aimed at oppression of the people by misuse of power intrusted to officers of government. In England it was the crown which had transgressed. In the case of the American Colonies crown and parliament together encroached on popular rights. The independent government of the Colonies as states, as has been seen, at once showed apprehension of their own legislative bodies—an apprehension which subsequent events proved to be well warranted The constitutional history of the states of the Union has witnessed a long series of acts restricting the powers of the legislatures. Distrust of these legislative bodies has become well nigh chronic.

The New Plan of Federal Government, 1787

By 1787 it became clear that a new frame of government for the republic was imperative, and a convention of the states framed a Constitution calculated to meet the pressing needs which were so plainly realized. Should the states accept the new plan two things were entirely obvious—the states would delegate important powers to the central government, and that government in vital particulars would act directly on citizens. These were radical changes, and they called for mature deliberation on the part of the people of all the states.

A Bill of Rights for the States

The states were to give up certain powers. Other powers were to be exercised concurrently by the federal government and the states. What security was there that the federal authority would not encroach on the remaining powers reserved by the states for themselves?

How was it to be authoritatively decided whether there were such encroachments or not? What was the remedy provided in case of encroachment? In short, what was the Bill of Rights of the States?

These questions went to the heart of things, and secession in 1860–1 was in one line of answer.

Further, in acting directly on citizens how was it to be decided whether there was a lawful exercise of power? What

rights of citizens were reserved from federal control? When determined, how were reserved rights of citizens to be guaranteed? What was the Federal Bill of Rights for citizens?

A Federal Bill of Rights for Citizens

These questions deeply agitated the people and the various state conventions elected to consider ratification of the federal compact. There was great reluctance to part with state powers—there was real apprehension when it was found that the new Constitution contained no formal bill of rights at all.

Jefferson expressed the hope that nine states would ratify, and that the other four would withhold ratification, as thus the need of a bill of rights would be forced on the new government. He deplored the absence of such a safeguard in the proposed Constitution. He said: "The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in time; but it will be at a remote period."

Jefferson's Warning. Works, Vol. II, 329, 358; III, 4, 13, 101

The particular situation which Mr. Jefferson hoped to see in fact (ratification by nine states only) did not come to pass exactly, but the end which he sought was attained after all. The Constitution was ratified and put into effect by eleven of the states, and several, including Massachusetts and New Hampshire, in New England, New York in the center, and Virginia and both Carolinas in the South, while they ratified and therefore accepted the Constitution as it was presented, at the same time recommended many amendments which would form a bill of rights. Ten of these were duly adopted, of which the first eight are prohibitions on the federal government for the protection of the people individually; the ninth, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," was by way of a caveat against dangerous construction; and the tenth, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

Amendments Adopted as Part of a Bill of Rights

are reserved to the States respectively or to the people"—was by way of a general bill of rights of the states—as indeed the ninth might be regarded.

The first eight were explicit in defining certain rights of the people as against the new government—the ninth and tenth were designed to guard the people as organized in states from encroachment by construction.

Chisholm v. Georgia, 2 Dallas, 49

The eleventh amendment prohibits a suit against a state by any citizen. The Supreme Court had construed the judicial power in the Constitution as covering such a suit, and the amendment was promptly adopted in order to limit the jurisdiction of the court in this respect.

It again, like the ninth and tenth amendments, was part of a bill of rights for the states.

In section nine of Article I of the Constitution there are specified certain prohibitions on the power of Congress, these in fact again being, so far as they go, a bill of rights, in the interest mainly of the people individually.

A Bill of Rights Needless

It was held by proponents of the Constitution that a formal bill of rights was needless, inasmuch as the federal government in any event would have no power not granted to it in the Constitution itself. The forebodings of those who were apprehensive in the matter turned out in the end not to be altogether unwarranted, as was clearly shown by the development of the doctrine of implied powers. The destruction of state bank paper currency by taxing it out of existence, for instance—that tax not being intended to yield revenue, but only to make state currencies impossible—could hardly have been foreseen by the framers in 1787.

Implied Powers. Veazie Bank v. Fenno, 8 Wallace, 533

The Bill of Rights for States. Amendments IX, X, XI

The bill of rights for the states, then, was found in Amendments IX, X and XI; in certain prohibitions on the powers of Congress found in Art. I, Section 9, such as the prohibition of a direct federal tax except in proportion to population (§ 4); the prohibition of an export duty (§ 5); the prohibition of preferential legislation in favor of any one state

(§ 6); in various provisions for interstate comity found in Art. IV.

The Tenth Amendment is the most vital of all, as explicitly stipulating that the states reserve all powers of government not delegated to the federal government or forbidden to them by the federal Constitution.

CHAPTER III

THE GUARANTORS OF THE FEDERAL BILL OF RIGHTS

The Three Essential Elements of a Bill of Rights

The mode of determining whether state rights have actually been infringed, and the proper procedure in cases of such infringement, are matters of vital importance. The enumeration of state rights in the Constitution would seem plain enough. But the mere enumeration of rights experience has shown to be insufficient (see pp. 20–22). It is clear that a complete bill of rights involves the three distinct things above noted—the enumeration, a specific mode of determining infractions, and a sufficient sanction when a determination has been reached.

State Rights

Neither of the last two was explicitly provided in the Constitution. "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, Shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Thus runs a vital section of Article VI. But who is to decide whether an act of Congress is in fact made in pursuance of the Constitution?

The Alien and Sedition Laws

This question came up very early in the years following the inauguration of the new government. Ten years had not passed after Washington first became President before certain acts of Congress—the Alien and Sedition Laws in particular—were violently attacked as being utterly beyond the constitutional powers of Congress. Such an act "is not law, but is altogether void and of no effect," "is not law, but is

altogether void, and of no force," recite the Resolutions of the Kentucky Legislature in 1798. A few days later the Legislature of Virginia declared: "That the General Assembly doth particularly protest against the palpable and alarming infractions of the constitution in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal Government . . . and the other of which acts exercises, in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto."

Nullification by a State?

The Virginia and Kentucky Resolutions were the expression of the opinion of the then legislative bodies of those two states. Was it in the power of any one state, having declared an act of Congress to be repugnant to the Constitution and therefore void, to proceed then to prevent its enforcement within its own territory? That was the plain implication in the speeches of those who favored adopting the resolutions in the Kentucky legislature, and in the following year (1799) the legislature of that state adopted further resolutions, including the statement "that the several states who formed that instrument (the Constitution), being sovereign and independent, have the unquestionable right to judge of its infractions; and that a nullification by those sovereigns of all unauthorized acts done under color of that instrument, is the rightful remedy."

Here is one definite answer to our question. Each state may decide for itself whether an act of Congress is in pursuance of the Constitution—if the decision is in the negative, then the state in question may within the area of its jurisdiction prevent the enforcement of the obnoxious act, treating it as "null, void and of no effect." This was the doctrine of nullification, stated in 1799 as an abstract principle, as Kentucky made no effort to carry it into effect—but flaming

up after a generation in South Carolina with reference to the existing tariff law.

Murray's Argument

The contrary doctrine was put clearly at the very outset during the debate in the Kentucky legislature of 1798. William Murray, speaking in the House of Representatives against the resolutions, pointed out in the first place that it was not in the constitutional authority of the legislature of the State of Kentucky to enter on the question of the validity of laws of the United States—that the Constitution of the state vested in the legislature merely the authority to make laws for the State of Kentucky, and that by the very theory of constitutional interpretation by which it was held that the Congress had transcended its powers in the acts to which exception was taken, the Kentucky legislature was estopped from action beyond its own constitutional limits. Of course the implication of this argument was that even granting the correctness of the contention of state authority in the resolutions, the legislature was not the state, but was only the agent of the state for specific duties—that if the state were to act at all in such a manner as the resolutions contemplated, it would have to be by a definite action of the state like that by which the federal Constitution had been ratified—a constitutional convention.

Madison's Works, II, 149

The Virginia Resolutions, drafted by Madison, were much more general and less drastic than those of Kentucky. Madison wrote to Jefferson, "Have you ever considered thoroughly the distinction between the power of the state and that of the legislature in question relating to the Federal pact? On the supposition that the former is clearly the ultimate judge of infractions, it does not follow that the latter is the legitimate organ, especially as the Convention was the organ by which the compact was made. This was a reason of great weight for using general expressions which . . . would shield the General Assembly against the charge of

usurpation, in the very act of protesting against the usurpation of Congress."

Each State Sole Judge of Constitutionality of an Act of Congress?

The Kentucky Resolutions of 1798 laid down at the outset this basis: "I. *Resolved.* That the several states composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a constitution for the United States and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each state to itself, the residuary mass of right to their own self-government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party; That the Government created by this compact was not made the exclusive final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

Madison's View

But when the theory in the last sentence was applied by South Carolina in 1833, Madison, who wrote the Virginia resolutions and who had been in close conference with the group who were responsible for the Kentucky resolutions, and who had no sympathy with the doctrine of nullification, pointed out that in the Virginia resolutions "States," not "each state," was the term used—that the vital clause, in the Virginia resolutions, "and that, in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto have the right and are in duty bound to interpose for arresting the progress of the evil," plainly meant, and was intended to

mean, not that any one state by itself was authorized to treat an act of Congress as null and void, but that the states together should take the proper action "for arresting the progress of the evil," and that such proper action was the orderly procedure of constitutional amendment.

Murray's Argument Continued—Supreme Court the Arbiter

In the Kentucky debate William Murray, having challenged the authority of the legislature to act in the premises, also made plain what in his judgment was the proper remedy in case of an act of Congress the constitutional validity of which was impugned. That remedy lay in the hands of the Supreme Court of the United States.

John Breckenridge, who introduced the Kentucky resolutions, insisted that the Constitution provided no common arbiter and hence that each state might and should act by itself, both in deciding whether an act of Congress was in excess of federal power, and in taking appropriate action in consequence of an affirmative decision.

Murray insisted that while no act of Congress was valid not in pursuance of the Constitution, yet at the same time the Constitution provided for a federal judiciary, vested such courts with jurisdiction over all cases "arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" that therefore the courts must decide whether a given act of Congress before them was in fact "in pursuance of the Constitution"—that the Supreme Court had already held one act of Congress invalid, and could be trusted with the constitutional rights of the states.

This view was held in the answers to Kentucky made by several of the state legislatures, notably by that of Massachusetts, which emphasized the sole jurisdiction of the Supreme Court of the United States on all questions of constitutionality.

Thus at the very beginning of our life under the Constitution was this question so vital to a successful federation,

raised and discussed. The two doctrines as to the whole subject matter of a controverted state right under the Constitution, its proper mode of adjudication, and the correct method of enforcement of such adjudication, were made manifest and were put in perfectly clear opposition.

The Kentucky view was based on no explicit provision of the Constitution—there was no express provision for such a contingency—but was an inference from what was believed to be the source and nature of the federal compact.

The Kentucky Theory

The Massachusetts view was again an inference—one drawn from two express constitutional mandates, the one establishing the supremacy of the Constitution and laws made in pursuance thereof (Art. VI, § 2), the other vesting in the federal judiciary jurisdiction over all cases arising under the Constitution and laws of the United States (Art. III, Sec. 2). The inference seemed irresistible that the court must take cognizance of the question whether what purported to be a law of the United States applying to a given case was in fact in pursuance of the Constitution, because if not it must be an obvious nullity.

The Supreme Court as Arbiter—See Hamilton, Federalist, No. 78; Also Chief Justice Marshall, Marbury v. Madison, 1 Cranch, 137

The Kentucky view, if carried to its logical conclusion by a state remaining in the Union, would lead to virtual anarchy. Any state at any time, holding that Congress had exceeded its powers in a certain act, might then hold such act null within its jurisdiction and might within that area prevent enforcement.

The Massachusetts view was in the orderly course of the adjudication and enforcement of law. But the objection was forcibly made that after all this contemplated the federal government passing on its own powers—the Court was constituted by the other two branches of the government and would naturally be responsive to their policies—it was all one government which should make, interpret and enforce its own will embodied in law, and any one state would be helpless.

Objection to the Supreme Court as Arbiter

Calhoun's Speeches, 1st Ed. 1843, pp. 31–34: Quoted by Foster, I, 129–30

Calhoun made this very clear in one of his addresses: "We ought not to forget that the government, through all its departments, judicial as well as others, is administered by delegated and responsible agents; and that the *power which really controls, ultimately, all the movements, is not in the agents, but those who elect or appoint them.* . . . The judges are, in fact, as truly the judicial representatives of this united majority, as the majority of Congress itself, or the President, is its legislative or executive representative; and to confide the power to the judiciary to determine finally and conclusively what powers are delegated and what reserved, would be, in reality, to confide it to the majority, whose agents they are, and by whom they can be controlled, in various ways; and, of course, to subject (against the fundamental principle of our system and all sound political reasoning, the reserved powers of the states, without the local and peculiar interests they were intended to protect, to the will of the very majority against which the protection was intended. Nor will the tenure by which the judges hold their offices, however valuable the provision in many other respects, materially vary the case. Its highest possible effect would be to *retard*, and not *finally* to *resist*, the will of a dominant majority."

There is no little cogency in this view, it must be admitted. To be sure the long tenure of judges makes them less likely to respond at once to the wishes of the executive, or of Congress, than if they served for a short term thus coming up frequently for reappointment. In the early years of the Supreme Court the Federalist justices had little sympathy with Jeffersonian doctrines. But in the long run the court is apt gradually to find itself in accord with the other branches. It was a pro-slavery court which made the Dred Scott decision in 1857, it was a Republican court which declared the greenback currency legal tender (Legal Tender Cases, 12 Wall. 457, etc.), and secession illegal (Texas v. White, 7 Wall. 724).

Again, while Congress cannot legislate a justice out of office,

it can increase the number of justices in the Supreme Court and thus perhaps alter the majority for or against a given subject. The number of justices was increased from seven to nine prior to the final legal tender decision above noted, and the decision was by a vote of five to four, the two new justices being in the majority.

Early Discussion, but No Early Test

The different theories as to our federal system, so early brought to the surface and so strenuously contested, did not have an actual test for many decades. The election of 1800 gave the party of Jefferson and Madison entire control of the federal administration and of Congress. The obnoxious laws expired by limitation, and the issues raised in the Virginia and Kentucky resolutions dropped from sight. The remedy was found at the elections. Had the Federalists continued in power and persisted in the policies which led to the Kentucky intimation of nullification, there might have been occasion to bring the differences to the test of serious action. But instead the theory of the individual state as final judge of the constitutional validity of acts of Congress merely became dormant.

The Supreme Court long remained under the control of justices who took a federalist view of the Constitution, with the Chief Justice, John Marshall, as its main exponent. This situation led Jefferson repeatedly to attack the Court's view of the power of the Court to pass on the Constitutional validity of Congressional legislation. He hoped the members of the Court might be removed by the power of impeachment, and that then his own appointees might displace them. But this procedure failed—impeachment lay, the Senate held, for "high crimes and misdemeanors," and not for differences of opinion with other branches of the government. In the end, however, the predominance of Jefferson's party secured a gradual change in the complexion of the Court, until under Chief Justice Taney in the Dred Scott decision (1857) what might be called the state rights view of the Constitution was

as emphatically maintained as had been the Federalist view in the Marbury case by Marshal (1803). Lincoln as sharply criticized the Dred Scott decision as Jefferson had the opinion of the Court in Marbury v. Madison.*

The protective tariff act of 1828 led to another excited controversy, perhaps quite as bitter as that of 1798–9. The aggrieved planters in the south held the act to be not merely unjust but also unconstitutional. The Constitution, they held, gave Congress the power to "lay and collect taxes, duties, imposts and excises," but that the tariff law of 1828 had for its primary object not the collection of taxes but the protection of certain northern industries. This, they held, was beyond the constitutional power of Congress, and hence was "null, void, and no law."

Nullification Act of South Carolina, November, 1832

In South Carolina the principles of the Kentucky resolutions of 1798–9 were fully adopted and measures were taken to carry them into effect. Recognizing the cogency of the view of William Murray in Kentucky and of Madison in Virginia, that the legislature was only an agent of the state for limited purposes, a convention of the state was duly called which adopted an ordinance declaring the tariff acts repugnant to the Constitution and therefore void, and that no duties provided by those acts should be permitted to be paid in South Carolina after the first day of February, 1833.

This was of course in accordance with the extreme view that the arbiter in case of an act of Congress whose constitutionality might be questioned was each state by itself and for itself, that "as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

Webster's famous speech in the Senate answering these

* The whole subject is well presented by Professor Haines ("The American Doctrine of Judicial Supremacy," Macmillan, 1914). There is also an interesting article in *The American Political Science Review*, Nov. 1924—"The Supreme Court and the Constitution," by Alan H. Monroe.

doctrines, aside from its contention, so powerfully presented, that the republic is a nation and not merely a loose federation of equal sovereigns, was devoted to advocacy of the Massachusetts principle of 1799 to the effect that sole and final jurisdiction on questions of the constitutional validity of acts of Congress lies in the Supreme Court of the United States. Webster's View

The issue was now joined clearly and definitely. South Carolina announced that duties should not be collected within her borders on and after a given date. President Jackson announced as emphatically that he should use the military and naval power of the United States to enforce the laws of the Union in South Carolina, and an act of Congress gave him additional powers to that end.

After all, however, again as in case of the Virginia and Kentucky resolutions a final settlement was postponed. Henry Clay's Compromise Act of 1833 virtually eliminated the objectionable duties, at least by a gradual diminution, and South Carolina rescinded the ordinance of nullification. Perhaps it would have been better had the question been settled by Andrew Jackson in 1833, without the compromise—perhaps then Abraham Lincoln would not have been confronted by the same situation at Charleston in 1861. The Compromise of 1833

Meanwhile the doctrine of the state as final arbiter on federal constitutional questions by irresistible logic led to the further doctrine that any state might at will at any time rescind the act by which it ratified the federal Constitution and thus sever its relation with the Union. To be sure Calhoun claimed that nullification and secession were mutually exclusive, that nullification was intended to preserve the Union, while secession would destroy it. But the fundamental idea of state sovereignty which underlay both were the same. If a state was a free and fully sovereign republic it could doubtless withdraw at will from a union to which it had given an adherence merely temporary. Secession

On the other hand was the doctrine of Webster and Jackson, that in forming the union the states had in fact parted with the unlimited sovereignty which belongs to an independent nation—that the "more perfect union" which the Constitution insured was permanent—that the Union in fact was a nation. This view was maintained uniformly by the Supreme Court—Calhoun doubtless would say that is what he forecast as probable should a branch of the federal government be the arbiter as between that government and a state. In fact, however, the actual arbitrament was that of arms. In the case of Texas v. White the Supreme Court said, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." But if it had not been for the military overthrow of the Confederacy there would have been no occasion for an opinion of the Court on this matter—or had there been one, it would have been negative.

Texas v. White, 7 Wallace, 700

The States of the Union are still referred to as "Sovereign States"—the term was especially common before the Civil War and has not yet gone out of use. It was the "Sovereign State" of South Carolina which adopted the nullification ordinance of 1832 and the ordinance of Secession in 1861. It was as a "Sovereign State" that Kentucky adopted the resolutions of 1798–9.

"Sovereign States"

It is true that among the reserved powers of the states are many which are commonly exercised only by states, like France, for instance, which are undoubtedly sovereign. It is true that the federal government is not superior to the states within the limits of those reserved powers.

The Real Sovereign the United States not the States or Federal Government

Have the states then any legal superior with reference to those powers? They certainly have—it is not the Government of the United States, to be true, but it is the United States, acting by three-fourths of their number on recommendation of two-thirds of each House of the federal Congress—or by two-thirds of their number through a federal conven-

tion—in other words, the process of amending the Constitution.

How State Rights May Be Legally Divested

A sovereign state has no legal superior. There is no right which by the Constitution belongs to the states—save only the equal representation in the Senate—that cannot quite legally be taken from the states by the above process of amendment. In other words when the states adopted the Constitution they in fact divested themselves of their sovereignty in favor of the new federal republic—with the reservation of the method of amendment and of the equal representation in the Senate. Presumably then it would take a concurrence of all the states, instead of three-fourths, to make the Senate representation unequal. By the process of amendment, however, not only may the states be deprived of any reserved power, but the process of amendment itself may be changed, perhaps making it much easier—transferring final sovereign power, for instance, to a bare majority of states.

The National Prohibition Cases—Decision of the Supreme Court, June 7, 1920, 253 U. S. 350

That there are no real limits to the power of the republic in stripping the states of their rights might have been held as a theoretical view in almost abstract political science until the decision of the Supreme Court upholding the eighteenth amendment in the National Prohibition Cases.

There were seven cases, two which came to the Supreme Court immediately, as suits in which the States of Rhode Island and New Jersey were parties, and five on appeal.

The validity of the Eighteenth Amendment and of the National Prohibition Act was impugned on various grounds.

Amendment "Necessary" U. S. Constitution, Art. V. Decision of the Supreme Court

It was held that the joint resolution had not received the approval of the two Houses of Congress as required by the Constitution:

1. Because it did not state in terms that the Houses considered it *necessary*—"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution."

The Court held such statement needless—the passage of the joint resolution implied that it was held necessary.

The Two-thirds Vote

2. Because it did not receive the vote of two-thirds of all the members of each House—that "both houses," i. e., the Senate and House of Representatives, meant those houses with full membership.

Decision of the Supreme Court

The Court held substantially that either House was sufficiently constituted to perform its functions if a quorum were present, and then two-thirds of those present, presuming a quorum, satisfied the requirement of the Constitution in Art. V.

The Constitution in Art. I, Sec. 5, § 1 fixes the quorum as a majority of all the members.

The original Constitution refers to two-thirds of either House of Congress in several provisions.

With the concurrence of two-thirds, either house may expel a member (Art. I, Sec. 5, § 2).

A bill may be passed over the disapproval of the President by a vote of two-thirds of each House. (Art. I, Sec. 7, § 2.)

Amendments to the Constitution may be proposed to the states by Congress if two-thirds of both houses deem it necessary (Art. V).

A treaty negotiated by the President may be ratified by the Senate if two-thirds of the Senators present concur. (Art. II, Sec. 2, § 2.)

The Senate sits as a court for the trial of impeached officers of the United States, "and no person shall be convicted without the concurrence of two-thirds of the members present." (Art. I, Sec. 3, § 6.)

Amendments to the Constitution preceding the eighteenth refer to a two-thirds vote of Congress in two provisions.

Disabilities imposed on certain classes of those who have "engaged in insurrection or rebellion" against the United States might be removed by a vote of two-thirds of each House (Amendment XIV, Sec. 3).

A quorum of the Senate for the election of a Vice-President was fixed at two-thirds of the whole number of Senators (Amendment XII).

It will be observed that in three of the above cases the two-thirds requirement is definite—treaties are ratified with the approval of two-thirds of the Senators present, convictions on impeachment requires the vote of two-thirds of the Senators present, and a quorum of the Senate for the election of a Vice-President is two-thirds of the whole number of Senators.

In all the other cases the practice of Congress has made the two-thirds apply to the number present, a quorum being presumed.

The Court followed these precedents in interpreting the Amending Article (Art. V).

If "two-thirds of both houses" in that Article means two-thirds of the whole number of members in each House, the same vote must be required to expel a member and to pass a bill over the disapproval of the President.

It might be desirable that such were the practice. But it is only in the twelfth amendment and in the provision for a quorum that the "whole number of members" is made the basis—in the first case explicitly and in the second by necessary inference. In the absence of an explicit reference to the "whole number" in the other places, and in the obvious authority of each House "to do business" if a quorum is present (Art. I, Sec. 5), it would seem clear that the two-thirds requirement in Art. V does not necessarily mean two-thirds of all the members of each House—it should be construed with the other two-thirds provisions in which there is no explicit or inevitable reference to the "whole number."

Definition of Intoxicating Beverages

3. The Eighteenth Amendment forbids traffic in "intoxicating liquors used as a beverage." The National Prohibition Act defines "intoxicating liquors" as certain beverages, whisky, wine, beer, etc., containing one-half of one per cent or more of alcohol.

It was contended that this definition of intoxicating liquor was incorrect in fact—that it included beverages which were not and could not be intoxicating—that such a definition went beyond the prohibition of the Amendment—assumed power therefore which had not been given to Congress, and that it was therefore unconstitutional and void.

It was urged by counsel for the government that unless many non-intoxicating beverages were included in the act it would be impossible to enforce the prohibition—that if every case called for a judicial determination of fact it again would be impossible to enforce—that at least thirty states had adopted the one-half of one per cent as the maximum. To be sure this last consideration had little weight, as state police power is not limited as is that of Congress—the states may forbid the sale of any beverages, intoxicating or non-intoxicating—Congress may forbid only intoxicating beverages.

Decision of the Court

The Supreme Court held that the definition was within the power of Congress—however admitting that "there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement."

4. The Constitution (Art. V) provides that an amendment proposed by Congress "Shall be valid to all Interests and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the Several States."

The Referendum States

It was objected that some states whose affirmative vote had been received and counted by the Secretary of State had not validly cast such affirmative vote, inasmuch as the action of the legislative bodies alone was considered, while the state Constitution required a referendum vote to complete the state action in such matters.

Ohio

The Constitution of Ohio required that an amendment to the Constitution of the United States should be submitted to popular vote. The legislature of Ohio approved the prohibition amendment, but at the popular vote, November 4, 1919,

the amendment was disapproved. Nevertheless the act of the legislature approving was formally certified to Washington and Ohio was counted among the ratifying states.

Missouri

The Constitution of Missouri forbade state approval by the legislature of any federal amendment "which may in any wise impair the right of local self-government belonging to the people of this state."

The legislature of Missouri ratified the amendment, although it obviously did impair the right of self-government in that state, and Missouri was counted as one of the ratifying states.

In all there were upwards of twenty states which had in some form a referendum clause in their Constitutions. The contention of counsel was that in such states "the legislature" must be considered as the whole organism of law making, namely, the two Houses of the legislative body and the people at the polls in addition.

True, when the Constitution of the United States was formed, in 1787, each of the thirteen states had a legislative body with delegated legislative powers, and direct legislation by a state, such as the modern process of the referendum contemplates, was unknown. Indeed, of the eleven states which enacted new Constitutions in 1776–82, ten enacted them by constitutional conventions, without referring them to a popular vote for ratification—Massachusetts alone requiring such a vote.

There can be no reasonable doubt, then, that a "legislature" in the minds of the framers meant a representative body.

Still, the Constitution has been found adapted to change of condition. Congress was given power to establish "post roads" (Art. I, Sec. 8, § 7)—but what members of the Philadelphia Convention dreamed of a steam or electric railroad? Both are easily held as "post roads" under the Constitution.

Decision of the Supreme Court

The Supreme Court held that "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it."

Feigenspan v. Bodine, U. S. Dist. Court of New Jersey; 264 Fed. Rep. 186

The Court gave no reason for the decision. A most illuminating discussion will be found in the opinion of the United States District Court of New Jersey (Feigenspan v. Bodine).

4. It was argued by counsel that the subject matter of the eighteenth amendment was not a proper subject to be embodied in the Constitution—that it was of the nature of ordinary legislation, not of the organic law.

"The power to amend," it was held, "is limited by the nature, intent and object of the constitution itself. The power to amend is only intended to extend to alterations and changes in the structure of the government created by the constitution, and such amendments must be in the nature of constitutional and not legislative provisions."

" Article V of the constitution was not intended to, and did not confer the power of ordinary legislation regulating the conduct and affairs of individuals. The only legislative power vested in the federal government is prescribed by the first section of Article One, which provides the 'All legislative power herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.' The so-called Eighteenth Amendment is but an attempt to exercise legislative power through the power to amend conferred by Article V of the Constitution. A sumptuary law, relating to the habits of people in their private lives, is surely a matter of ordinary legislation."

There is no doubt that many of the states in their Constitutions have embodied much matter of the character of ordinary legislation. The main reason for this is no doubt the fact that the proponents of such legislation are anxious to put it beyond the power of a succeeding majority to secure an easy repeal. In other words they, being in the majority, desire to

embody their will in law, but are not willing to grant the same right to an adverse majority.

Decision of the Supreme Court

The Supreme Court held that the subject matter of the eighteenth amendment is within the power to amend reserved by Article V of the Constitution.

The Merits of the Case

This point touches on a question of grave concern in the constitutional history of many, if not all, of the states themselves, and has now come into the federal system as well.

Organic and Ordinary Legislation

The organic law should relate to the structure and powers of government, and to the limitations on those powers. All else should be matter of ordinary legislation. Moreover, constitutional enactments should be subject to more mature deliberation—should be susceptible of less easy and rapid change—than ordinary legislation. So much seems clear. It must be admitted that it is not always easy to decide just where to draw the line. Some things obviously belong to the Constitution. Some things as clearly do not. The difficulty comes when there is just ground for doubt.

Two Influences towards Constitutional Distention

Two influences have tended to embody in the Constitutions of states provisions which in many cases perhaps—in others certainly—might better be left to legislative discretion. These are, in the first place a growing distrust of legislative bodies—in other words, of the politicians who compose those bodies; in the second place an eagerness on the part of advocates of certain measures not merely to embody these measures in law but then to secure them so far as possible against repeal. Our Constitutions accordingly are filled with ordinary legislative enactments—put therefore beyond easy reach of change of public sentiment. In other words, as has been said, majorities are not content to secure legal adoption of their ideas while they are majorities—they seek also to prevent a future adverse majority from doing the same in their turn.

Some Results

However, there is a sharp distinction to be drawn between what is legally possible and what is the wise and just thing

to do. It can hardly be contended that the sovereign people have by their organic law made it impossible for them to change that law whenever and however they will. So far as the United States Constitution is concerned it would surely be extremely difficult to distinguish exactly what is and what is not changeable under the theory of *non possumus* as applied to the amending power. The decision of the Supreme Court may not be what would have been forseeable by the framers, but it is in accordance with common sense. The sovereignty when the Constitution was adopted was transferred from the separate states to the states united—to three-fourths of the whole number, acting on the initiative of the Congress or by two-thirds of the states themselves,

Power vs. Expediency

This transfers the whole question and any related question from the field of power under the organic law to the field of justice, wisdom and self restraint. By the process of amendment as construed by the court no part of the Constitution is beyond the power to change. The very exemption of the equal representation of the states may itself be rescinded. Any provision of the bill of rights of persons may be repealed —a state religion may be established, freedom of the press and trial by jury may be abolished. There is nothing to prevent, if the members of Congress can be dragooned into giving the vote perhaps of two-thirds of a bare quorum in each House and if three-fourths of the state legislatures can be driven to assent by bare majorities.

Unlikely, one says? Doubtless. But what could have appeared less likely in 1787 than the abolition of slavery or the prohibition of alcoholic beverages?

We have at present forty-eight states, differing widely in population and in economic resources.

On an occasion of unusual popular excitement it is quite possible for an amendment to the federal Constitution to be forced through the Congress by a vote of at least two-thirds of a quorum of each House, and through the legislatures of

three-fourths of the states by a vote of at least a majority of a quorum of each House in each legislature—especially bearing in mind the methods now in vogue for bringing pressure to bear on members. But if sober second thought should lead the great mass of the people of the United States to the conclusion that any such amendment was an error it would be enormously difficult to rescind it.

There are forty-eight states. The adverse vote of thirteen of them would suffice to defeat any amendment—and repeal of an amendment would itself require another amendment.

The census of 1920 gave these forty-eight states a total population of 105,264,049—in round numbers one hundred five millions.

There are eighteen states which have a population of less than a million each. Thirteen of these with a population of perhaps twelve millions, would suffice to prevent the judgment of the remaining thirty-five states, with a population of ninety-three millions, from being embodied in the organic law.

Minority Rule

This is minority rule pure and simple. Were it a case of the protection of this minority from control by the majority on a specific matter which the minority held especially obnoxious, much could be said for it. The protection of minorities against majority tyranny is a vital function of any Constitution. But when it comes to control by a minority over a majority, especially if a great majority, on a matter which that majority regard as obnoxious, then the injustice is so palpable that law and government are in danger.

It is clear, then, that no state is secure against the United States—against the action of three-fourths of the states in amending the Constitution. That process may be an attempt to protect the minority states—it is quite as likely to be aimed at control of that minority much against their will.

The Supreme Court the

So much for the Supreme power of the United States as a whole. But the burning question from the first has been the protection of states individually against the *government* of

Sole Guarantor of the Constitutional Rights of the States

the United States—in other words against legislation by Congress in excess of power under the Constitution. For this there is no shadow of remedy save in the Supreme Court.

Nullification by a single state, or secession of a single state, are idle visions of the past. There is nothing left but the Court.

Checks and Balances in Government

Government is intended for the general good. But long experience has taught that in too many cases persons to whom governmental power are intrusted misuse their powers, for their own benefit or for the benefit of limited classes of the community. Hence Charters and Constitutions, hence devices for governmental organization embodying checks and balances, limitations on power and restraint of one branch of government by another.

The Constitution of the United States is a most striking illustration of such a system of a series of mutual governmental limitations. The federal government as a whole has only the powers granted, either expressly or by necessary implication in the document itself—all other powers being reserved to the states or to the people. Each branch of the federal government in like manner has only the powers constitutionally granted to it. The three branches are largely interdependent. The executive appoints the judges, subject to the approval of the Senate. The Congress sits as a national returning board on the presidential election, and in case of a failure of election by the electors then the lower House chooses the President and the upper House chooses the Vice President. The President has a qualified negative on legislation. The Court passes on the constitutional validity of legislation. This last is most vital.

Congress Not an Omnipotent Legislature

The states in adopting the Constitution were as far as possible from planning that the Congress should be an omnipotent legislature, like the British parliament. The Congress, like all other governmental agencies, was to have, and has, only delegated powers. The Constitution, and laws made

"in pursuance thereof," are the supreme law of the land. Acts of Congress, then, which are in pursuance of the Constitution, are binding on all. Acts of Congress which are not in pursuance of the Constitution, are binding on no one. They are not laws at all.

But in case the constitutional validity of legislation is in question, who is to decide?

The President is himself part of the law making authority, having a qualified negative on bills which he may disapprove.

The Congress? If Congress is to be the sole judge in its own case; if by a majority vote, or a two-thirds vote, or a unanimous vote, it is to decide what is its own power under the Constitution, then that document is an idle dream, and the Congress at once becomes an omnipotent body.

The Jurisdiction of the Court

The Court has jurisdiction over any case coming before it which arises under the Constitution, or under "the laws of the United States." But what are "laws of the United States"? An act of Congress is not a law unless "in pursuance" of the Constitution—and the Court then must consider whether the Congress in enacting the statute has kept within the limits of constitutional power.

A Majority Vote in the Court against Legislation

A decision of the Court is in any ordinary question of law made by a majority vote—and the Constitution is silent on the subject, obviously assuming that the Court would speak by a majority of its membership on all questions. By a majority vote, then, the Court has decided the Constitutional validity of statutes. By a majority vote the Congress enacts bills—and that, too, not by a majority of the whole number of members, but by a mere majority of those present, the presence of a quorum being presumed. Even the two-thirds required to over-ride the President's disapproval is merely two-thirds of those present, presuming a quorum. Thus for ordinary legislation a bill may pass the Senate by 25 votes out of a quorum of 49, and the House by 110 votes out of a

quorum of 218. A two-thirds vote of the Senate might be 33-only one more than one-third the *whole membership;* and a two-thirds vote of the House might be 145, just one-third of its membership. Of course as a rule in contested questions those absent are paired.

Influence of Organized Minorities on Congress

Moreover much legislation is determined by the activity of organized minorities. Usually the mass of a popular party vote is unchanged from year to year, and a member of the House who seeks reëlection looks to the margin which may decide a majority or plurality—and these organized minorities claim to have and at times do have such margins. It has been by the pressure of such bodies, always active, often wholly selfish, that some of the most reprehensible legislation has been enacted.

Modes of Securing Legislation

Hon. F. O. Lowden, Address, "The Problem of Taxation in a Democracy," The University of Chicago, June, 1921

"The employees of the city, or the State or the Nation all the while become a more important factor in increasing the cost of government. When numerous, they now are generally organized in the several branches of the public service. Whatever the nominal purpose of the organization, their keenest activities are directed toward an increase of pay. These organizations have come to be so powerful that they exercise a very great influence upon legislative bodies. The different organizations are usually found coöperating closely when the question is an increase of salary for members of any one of them. Though a large majority of our people still earn their own livelihood in private pursuits, the minority which derives its sustenance from the public treasury has become large enough, thoroughly as that minority is organized, to frighten city councils, state legislatures, and even Congress into complying with their demands. It is unfortunate that nearly always those who seek for any purpose to get money out of the public treasury are thoroughly organized. The taxpayers as such never are. It thus happens that the militant minority is often more powerful than the unorganized and perplexed majority. This fact in itself is the strongest

argument of which I know against extending governmental activities beyond absolute need."

For most of legislation of such character and lobbied through by such agencies, the people have no redress except at the polls. Occasionally the issues are so plain that a recreant member is called to account. Often however matters are so confused that such a member slips by—people wonder why taxes are so high and why the cost of living keeps mounting; but the needless cost of government is not always clearly seen as one large factor.

When it comes to a clear question of power under the Constitution, however, there is an immediate remedy—the Supreme Court—and it is the only safeguard of the people against legislative usurpation.

Congress Seeks More Power

Congress steadily seeks to enlarge its own jurisdiction. By a great mass of legislation resting in some way on what are claimed as implied powers, a vast field of legislation has been seized at which the framers would be amazed. Every amendment to the Constitution since the twelfth (adopted in 1804) has increased the power of Congress, and has lessened the power of the states. In every Congress numerous joint resolutions for the amendment of the Constitution are introduced. Fortunately few or none of them pass, but a large proportion of them are intended to increase the power of the Congress. But so salutary a measure as that authorizing the President to veto items in an appropriation bill, often introduced, makes no progress. It would lessen the power of Congress. The enormous extravagance of Congress, in river and harbor appropriations, in pension legislation, in long years without a national budget, and now in restiveness under a budget system, has piled up costs on the taxpayers—and taxpayers in the end are the whole people—until the cost of living is getting unbearable.

Members of Congress, with a lofty sense of their own position, ask whether their action, which is the "voice of the

"The Voice of The People"

people," is to be nullified by a bare majority of the Supreme Court—in effect by the vote of one man out of nine. The fathers who framed and adopted the Constitution made a careful distinction between the reasoned and deliberate judgment of the people as embodied in the organic law, on the one hand, and the passing popular whim which is reflected in the composition of the Congress as resulting from any particular election, on the other. Party majorities come and go, popular excitements are ephemeral, but with time and adequate discussion the people are apt to reach a conclusion based on facts and reason rather than on a temporary gust of passion.

Even on fundamental questions hasty action may not express the real will of the people. The fifteenth amendment was proposed to the states by the 41st Congress. Had it not been passed than it would not have been passed at all. No later Congress would have proposed it by the requisite two-thirds of each house. Had it not gone to the states then it would never have been ratified at all. At no time since then could the legislatures of three-fourths of the states have been induced to approve. On the organic law the greatest deliberation should be the rule, always.

The only bulwark of the Constitution, of the rights of minorities, of the rights of the states, is the Supreme Court. If Congress could in some way get that out of the way, the course would be clear. Every attempt to override the Supreme Court, to limit its power over the constitutionality of acts of Congress, to recall or in other ways to control its members or its decisions, is an attempt still further to increase the powers of Congress. The power of Congress should be lessened, and not increased. The control by the Court is an unmixed benefit to the nation. If the people of the states really wish Congress entrusted with a power which the Court holds not to exist, a constitutional amendment can be adopted, as was done in the income tax matter. If no such amend-

ment is adopted, it is to be presumed that the people of the states concur with the Court. It should be remembered, too, that the Court gives the presumption of constitutional validity to an act of Congress, and only reluctantly and very rarely holds the opposite view. Up to the present time only 39 acts of Congress have been held unconstitutional by the Supreme Court.

A Majority Vote in the Court to Sustain Legislation

Complaint is made that at times an act of Congress has been held repugnant to the Constitution by a bare majority of the Court—by a vote of 5 to 4. We hear nothing of the cases in which an act of Congress, involving further encroachment on the reserved powers of the states, is *maintained* by a bare majority of the Court—by a vote of 5 to 4. But there are such cases, not a few of them. In one such case Chief Justice Fuller, speaking for the minority, said of the act of Congress under consideration: "It is a long step in the direction of wiping out all trace of State lines, and the creation of a centralized government." This "long step" away from the most fundamental principle of the Constitution was approved by a bare majority of the Court—a single justice of the five might have determined an opposite decision, and thus have maintained the reserved rights of the states. But it is only when the "single justice" suffices to secure the bill of rights of the states that loud complaint is heard.

Further, one plan urged for a constitutional amendment would forbid the Court to hold void for unconstitutionality an act of Congress without the concurrence of at least seven of the nine justices. In other words even if two-thirds of the Court are clearly of the opinion the Congress has usurped authority, a "single judge" can prevent the Court from standing between the people of the states and their fundamental rights.

Danger to the general welfare lies in the steady aggrandizement of the Congress, not in the orderly action of the Supreme Court.

CHAPTER IV

HAS THE FEDERAL EQUILIBRIUM BEEN MAINTAINED?
CONSTITUTIONAL AMENDMENTS ENACTED

Nature of the Amendments Enacted

The first eight amendments, as has been said, are limitations on federal power for the benefit of individuals.

The Ninth and Tenth Amendments are limitations on federal power for the benefit of the states or of the people.

The First Eleven Restrict the Power of the Federal Government

The Eleventh Amendment is a limitation of federal power in the interest of the states.

The Twelfth Amendment is of the nature of a change in the electoral machinery in electing a President and Vice-President—it does not alter the power either of the federal government or of the states.

The Twelfth Made No Change in Relative Power

The Twelfth Amendment was ratified in 1804, and thereafter for a period of sixty-one years no further amendment was made.

Thus far all amendments were in the interest of the states, or of the people, as against the exertion of federal power.

The Civil War Amendments—Their Genesis

The American Civil War (1861–5) resulted in the complete overthrow of the seceding states. The doctrine of secession was settled adversely by the arbitrament of arms, and no amendment, of the federal Constitution would have added to its utter discredit. No state is likely to attempt secession hereafter, under any circumstances which can be forseen at present. Moreover the fundamental claim of the triumphant Union was that secession was not a constitutional right in any event. Hence there was no attempt to add an amendment denying what the victors held did not exist. One cannot kill the dead.

Secession

But the Supreme Court in a number of cases ruled against the validity of legal attempts at secession. Notably in the case of Texas v. White the principle of the permanence of the Union under the Constitution was made very definite—the federation is "an indestructible Union composed of indestructible States."

Texas v. White, 7 Wallace 724

The abolition of slavery was another thing, however. In all the seceding states and in several which remained true to the Union slavery existed by law. Slaves were held as personal property, not attached to the soil, as had been the case in Europe in some past ages. Persons with a fourth or more of negro blood were legally defined as mulattoes and were held to be negroes under the statutes. After all slavery was the cause of the war, as it had been the cause of bitter dissension through many decades which preceded the war. It was universally recognized that the overthrow of the Confederacy meant the destruction of slavery. However, that under the circumstances was naturally not left to the states, but was embodied in an amendment to the constitution which covers the whole republic.

Slavery

Code of Virginia, Title 30, c. 103 S, 9, 11

Amendment XIII, 1865

The Thirteenth Amendment, adopted in 1865, providing for the abolition of slavery, was a limitation on the power both of the federal government and of the states.

The Thirteenth limits power both Federal and State

The federal government thereafter has had no power to enact a fugitive slave law or a law permitting slavery in the territories.

The states thereafter have had no power to enact laws establishing the status of slavery, with any of the consequences of such status.

Thus for the first time an amendment directly invaded the theretofore reserved rights of the states—did not transfer such power to the federal government, but forbade it altogether. Power was taken from the states.

Power taken from the States

There were other isues, however, which it seemed important to settle in permanence.

Other Issues

The status of negroes varied with the states. Some made them citizens. Others did not. The Supreme Court in the Dred Scott case (Scott v. Sandford, 1857), had held them not to be citizens under Federal Law. Slavery being no longer a legal status, the dependent character of the negroes was altogether anomalous. Accordingly, the status of citizenship was made a part of the Constitution whereby the freedmen and all of their kind become citizens—"all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

Amendment XIV, 1868, Sec. 1, Citizenship

Thus a virtual definition of citizenship was embodied in the Constitution. Theretofore citizenship within United States was by implication. Mr. Justice Story (Commentaries, § 693) said: "Every citizen of a State is *ipso facto* a citizen of the United States." Mr. Justice Curtis (Scott v. Sandford, 19 Howard 396) said: "Every person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States." As the Constitution in its original form gave Congress the power to prescribe the rules for the naturalization of aliens, and stopped there, it is evident that the remaining power to prescribe who shall be citizens was left where it already was, in other words with the States. A citizen of a State was *ipso facto* a citizen of the United States. To be sure legislation as to naturalization was from the first under the Constitution vested in Congress, and a naturalized alien first of all became a citizen of the United States, and was a citizen of a State only by virtue of domicile. But now by the fourteenth Amendment birth on the soil as well as naturalization constituted a citizenship in the United States, and native born citizens, as well as those naturalized, become citizens of states merely by virtue of domicile.

It should be noted, however, that this new classification of citizens has no relation to residents of states who do not

come under the classification, and who therefore are not citizens of the United States. States may confer on alien residents within their jurisdiction all the rights and privileges of citizens so far as such rights and privileges are within the power of the state to grant. The right to vote, the right to hold state and municipal office, for instance, may be given to resident aliens. Perhaps this may fairly be held to constitute citizenship of the state, though of course it can be by no means the state citizenshipco mbined with citizenship in the United States contemplated by the Fourteenth Amendment. Further, such state status does not divest the alien of his foreign status.

Civil Rights

But the amendment establishes a very rational principle— that federal citizenship in all cases shall be determined by federal law.

By the same article the civil rights of citizens are guaranteed.

Bill of Rights as against the States

A significant provision of Sec. 1 of the amendment is the following: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This is in the way of the enactment of a federal bill of rights as against the states, as the first eight amendments are a bill of rights as against the federal government—all for the protection of individuals.

Guthrie, Fourteenth Amendment, pp. 58–65

It has been thought by some that the rights guaranteed in the first eight amendments are "privileges and immunities of citizens of the United States," and that they are therefore taken over by the Fourteenth Amendment and are all thereby made to apply to the state.

There is in any event a clear limitation of state power. An interesting illustration is found in the case of Meyer v.

Teaching German; Meyer v. State of Nebraska, 262 U. S. 390

State of Nebraska, recently decided by the Supreme Court (June 4, 1923). The Nebraska statute prohibited the teaching of German to children who had not completed the eighth grade. This the Court held to be an infringement of the liberty of the person guaranteed by the Fourteenth Amendment.

On the other hand a compulsory vaccination law of Massachusetts was held valid, as a legitimate exercise of the police power.

Vaccination, Jacobson v. Mass., 197 U. S. 11

The fourth section of the amendment still further limits state power; "The validity of the public debt of the United States, authorized by law . . . shall not be questioned." Both the United States (i. e. the government of the United States) and the states are forbidden to assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.

The Rebel Debt

While aimed at the states lately in the Southern Confederacy, still the legal limitation in power is general. Its most significant feature is its limitation on the power of the states.

Political Rights

Political rights, however, were still left to the states, as had been the rule from the first. Especially the right of suffrage by the uniform custom of the republic is by no means a natural right, but is a privilege bestowed by the state.

The Declaration of Independence recited certain rights as natural and inalienable, belonging to all men—life, liberty and the pursuit of happiness were especially named. Of course this small list by no means exhausted the possible rights with which men are by nature endowed; but the right to vote and the right to hold office not only were not mentioned, as among them, but by the well understood and long continued practice of the Colonies, and later of the states, these rights existed only as granted by specific act of the body politic. The federal Constitution did not enter on this field, naming only cer-

tain qualifications for holding federal office, but not touching the qualifications for office-holding in the states or the qualifications for suffrage either federal or state. The only reference to the latter was in reference to the choice of members of the United States House of Representatives—"the electors in each state shall have the qualifications requisite for the most numerous branch of the State legislature." This specifically left the determination of the conditions of suffrage where it was already lodged—in the respective states. Thus the states were free to differ widely, if they chose, in this important matter—and they did differ. Senators were to be chosen by the state legislatures, and the latter were elected by the people under such regulations as the states saw fit to prescribe. The presidential electors were to be chosen in each state in such manner as the legislature thereof might determine.

U. S. Constitution, Art. 1, Sec. II

In other words the theory was (1) that political rights in the states—the right to hold state office and the right to vote for state or local officers—was no concern of the federal government; and (2) that officers of the federal government all owed their election or appointment directly or indirectly to the states, and hence that the qualifications of suffrage were exclusively within state jurisdiction.

The second section of the Fourteenth Amendment does not really depart from the theory above indicated. It does however enter the field to this extent—that if any further qualifications for suffrage than sex (male) and age (twenty-one) should be imposed by a state, then the number of representatives of that state in the federal House of Representatives should be reduced proportionally. The striking provision is, however, that this reduction is based on limitations of suffrage not merely for federal office, but also for certain state offices—"the executive and judicial officers of a State, or the members of the legislature thereof." To be sure state officers might have an important share in deciding the results of

Amendment XIV, Sec. 2

federal elections. Still the provisions in question does provide for penalizing, so far as representation in Congress may be concerned, any state which may see fit for its own government to limit the suffrage beyond the elementary sex and age requirements. To this extent, therefore, the amendment virtually enters into the field of reserved state rights and tends to lessen the state's liberty of handling its own affairs in its own way.

Amendment XIV, Sec. 4

Another vital provision of the Fourteenth Amendment prohibits repudiation of the public debt of the United States on the one hand, and on the other hand prohibits the assumption, either by state or nation, of any debt incurred in rebellion against the United States, or of any compensation for the emancipation of slaves.

By these two amendments it was intended to put the results of the Civil War beyond overthrow coming from any changes of political party control of the government.

The Two Amendments Easily Enforceable

It will be seen that these provisions of the fundamental law are easily enforceable, either by ordinary judicial process or by ordinary legislation. The remedy for an attempt to restore slavery, for repudiation of federal financial obligations, or for the assumption of insurgent obligations, would lie in the Courts. The remedy for disfranchisement would lie in an act of Congress.

Amendment XV, 1870

The Civil War ended, after four years of desperate contest, with the complete overthrow of the Confederacy. The Union armies were everywhere triumphant. The Confederate forces were prisoners of war or were hopelessly scattered.

Reconstruction

Federal troops occupied every Southern state. Then came the grave question of reconstruction of the recently insurgent states within a restored union—a question far more perplexing and difficult than the prosecution of war. It called for the highest order of statesmanship—for self-control and patience and foresight. On the one side were the bitterness of defeat and economic prostration. On the other side were the

intoxication of victory and the animosity of long conflict. Here the nation sadly needed its lost leader—the assassinated Lincoln. No other man in public life had the confidence of the nation as had Lincoln. No other man could hope to influence Congress as Lincoln probably could have done. "With malice toward none, with charity for all," he had been eager to bind up the wounds of war and to cement a restored union. In place of his sanity, patience and wisdom there were now the wrong-headed folly of his successor in the White House and the dominance of Congress by passion and by visionary theories.

Settlements necessitated by a great war, whatever the military outcome, are always difficult. Our own Revolutionary War ended in 1783. But confusion, distress and most serious danger of a condition little short of anarchy enveloped the new republic until the Constitution was put into operation in 1789. The Great War from which the world has only recently emerged has so shattered public order that for long years there bid fair to be uncertainty and distress that will threaten the foundations of civilization. History is replete with examples.

Within the limits of the Southern Confederacy ordinary business was shattered. Local governments were disorganized, society was impoverished, millions of negroes recently slaves, ignorant and improvident, were cast adrift without control or wise direction. Meanwhile as acts of secession were determined by the issue of the war to be legally void, of course the seceding states were still members of the Union, entitled to share in its government but unrepresented in Congress. Obviously, too, "unrepentent rebels" as they were called, could hardly be intrusted at once and unconditionally with power to settle their own destinies and those of the nation.

The immediate pressing needs were plainly four.

There should be at once a definite organization of local

government, for the maintenance of the ordinary processes of justice and for elementary protection of life and property. There should be a settlement of the main issues of the war in the fundamental law of the nation so that they could not be imperilled by the mutations of party politics. Definite order should be taken for the care of the masses of former slaves so as to protect them from injustice on the one hand, and so as to guide them to a useful place in the body politic, on the other. They needed to be taught sobriety, industry and thrift, on their own account. Then, and not until then, should the states lately in rebellion be readmitted to share in the government of the restored nation.

Early steps were taken in these directions. State governments were organized. The Freedmen's Bureau provided for the care of the blacks. The Thirteenth and Fourteenth Amendments embodied the results gained by four years of war in the organic law. The acceptance of these amendments was made a condition of the restoration of the lately insurgent states to their place in the government of the Union.

The Thirteenth Amendment. Rhodes, V, 539–40

Enough Southern states accepted the amendment abolishing slavery (XIII) to insure its ratification by three-fourths of all the states in the Union and it became a part of the Constitution accordingly (Dec. 18, 1865).

The Fourteenth Amendment

But the course of the states in the former Confederacy with reference to the Fourteenth Amendment had a different history.

This amendment offered an entirely reasonable settlement and should have been accepted at once by all the states of the south. It gave the late slaves citizenship and guaranteed them civil—not political or social—rights. It provided, in case any state saw fit to disfranchise them, which the states were left a perfect right to do, for a remedy only to this extent, a universal rule that representation in Congress and in the electoral colleges should be based on voting strength

rather than on the total population. States which see fit to disfranchise should thereby automatically have their representation reduced. This was just, and a basis of representation on voting strength is entirely sound in political science.

The financial provisions were to be expected—they were natural results of the war and should have met with no cavil.

Of course the third section of the amendment, by which many of the civil and military leaders of the Confederacy were disfranchised for the time being, was disagreeable to their followers. But that again was a result of the war to be expected and should have been accepted. Section 3

But here the South made a vital mistake, and they were aided in it by the curious course of President Andrew Johnson. Thus again the sanity of Lincoln was sadly needed. Encouraged by Johnson, and by other politicians in the north and misled by emotion rather than by reason, the ten states of the Confederacy unanimously rejected the Fourteenth Amendment (Louisiana, the last of the ten, in February, 1866). This action of the Southern states was fatal to a conservative and reasonable settlement. The opportunity was gone and the future fell into the hands of fanatics in Congress who were thereby enabled to force through the Fifteenth Amendment.

The Fifteenth Amendment took a long step in depriving states of power over their own electorate. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." While the United States (i. e., the federal government) is also prohibited from such action evidently the main inhibition lies against the states. The Fifteenth Amendment Suffrage

The immediate purpose was to secure negro suffrage, especially in the Southern states. At the same time there were Northern states which limited the electorate to whites.

So far as federal elections are concerned there is no doubt

a plausible case for a federal suffrage law—although inasmuch as presidential electors, senators and representatives in Congress directly represent their states it may reasonably be held that their states should decide on what basis and in what manner they should be chosen. However that may be, it is surely going rather far for federal law to prescribe the qualifications for suffrage within a state for the choice of state officers. "An indestructible Union" it may be, but where the state loses its liberty to determine its own electorate for the choice of its own government the state is on the way to the destruction of its most vital elements of autonomy.

Seriously Infringes State Powers

"Suppose an article had been introduced in the Constitution empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarranted transportation of power, and as a premeditated engine for the destruction of the State Governments." Hamilton, *The Federalist*, No. LIX.

Sumner's Theory

Sumner was not interested in the amendment, and was not in his seat in the Senate when the vote was taken. He thought it unnecessary—he held that Congress had power without it to legislate on all questions of civil and political rights. "Anything for human rights," he said, "is constitutional." The Supreme Court, in its decision on the civil rights act somewhat later, took a much more restricted view. The Court held that the powers of Congress are found only in the Constitution. Sumner considered the Declaration of Independence as also a part of the fundamental law—he maintained that its pronouncements were interpretative of the Constitution and of coequal force with it.

Sumner's Works, XIV, 425

Sumner's Works, X, 220

In one of his interminable speeches he explained: "I have no hesitation in saying that universal suffrage is a universal right, subject only to such regulations as the safety of society may require."

The regulations to which he referred related to age and residence—perhaps to education, though he doubted the neces-

sity of that. His point was that such restrictions would in no case be permanent—the franchise would in fact be open to all.

As a substitute for the amendment he proposed a bill by which the right to vote and to be a candidate for office at all elections—national, state, territorial, and municipal—and to hold office if chosen, should be extended to all without distinction as to race or color. His views, however, as to the existing powers of Congress had practically no support.

But it was seriously proposed that the second of the two great political rights, that of holding public office, should be embodied in the amendment. Senator Edmunds favored this.[1] But insistence on this provision would have defeated the joint resolution, and if it had failed in that session it would have failed altogether. As it was there was exactly a two-thirds vote in its favor in the Senate, and Anthony of Rhode Island had served notice that he would vote in the negative if the office holding clause should be included. Moreover the sweeping victory of the Republicans in the election of 1868 had given them control of twenty-five legislatures and by making ratification a condition of the recognition of the few remaining Southern states (Virginia, Mississippi and Texas) three-fourths of the states were assured. It was fully realized that another election would destroy this favorable situation—as indeed it did. The amendment could not have passed with a two-thirds vote of both houses in any subsequent Congress, nor at any subsequent time could it have commanded three-fourths of the legislatures.

Cong. Globe 3rd Session, 40th Congress, p. 1626

Besides those who may have thought with Sumner on the abstract question of the inherent right of suffrage, there were some who favored extending the privileges to all because it would enable the negroes to protect themselves—or so it was

[1] Webster in the Constitutional Convention of Massachusetts of 1820, said: "No man has a right to hold office—the people have the right to make such conditions as they may see fit."

thought—and there were others who merely sought party advantage. It seemed to them that universal suffrage would insure most of the late slave states to the Republican party and hence would perpetuate the power of that party indefinitely. They proved to be mistaken, but at the time the prospect was alluring. The joint resolution passed, but it barely passed.

Had the Southern states promptly accepted the Fourteenth Amendment at the time it was offered as a condition to reconstruction, the Fifteenth could never have been adopted, and there would have been a different and less distressing history of reconstruction.

It is of course idle to speculate on what might have been. If however the reconstruction of the Union after the Civil War could have been determined by three men—Abraham Lincoln, Ulysses Grant and Robert Lee—we should have been spared ghastly errors.

Enforcement of the Fifteenth Amendment

When it came to putting the suffrage provisions of the Fifteenth Amendment in force a very different situation developed from that which the other two amendments had to face.

It was of course plain that, while the intent of the second section was to enfranchise the freedmen, still the overwhelming mass of them might be legally disqualified by any state restrictions based for instance on intelligence or on property. Senator Morton of Indiana pointed this out during the debate.

Enforcement a Failure

The attempt to enforce in certain states government by ignorant masses of enfranchised slaves over an intelligent minority, did not succeed. Whatever the form of law, whether a part of the Constitution, or statutes enacted by Congress—whatever the motive, whether purely humanitarian, as was Sumner's undoubtedly, or the aim of partisan politics—in the end it could not be enforced.

The act of May, 1870, and that of February, 1871, vested

in the federal Courts exclusive jurisdiction over all cases arising under attempts to enforce the rights granted by the amendments. The official organization for such enforcement was substantially the same as that provided under the Fugitive Slave Law of 1850. So far as these laws bore on the conduct of individuals, however, the Supreme Court afterwards held them unconstitutional. The amendments prohibited only acts of states, and gave no power to Congress to regulate acts of private persons.

Rhodes, VI, 294–6

U. S. v. Reese, 92 U. S. 214, 216–221; U. S. v. Cruikshank, 92 U. S. 554–5; U. S. v. Hauss, 106 U. S. 6295. Dunning, Reconstruction, C. XVI; Rhodes, VI, 312

So far, on the other hand, as the Congress was actually vested with power over states, attempts to exercise the power in the end were futile. As Rhodes remarks "Legislation begun against natural laws is apt to be followed up by more of the same kind in the futile attempt of man to hasten nature's patient ways, and one force bill directed against a community, accustomed to liberty, has to be strengthened by another to fasten the yoke of tyranny."

The first and obvious means of preventing the negro vote from continuing to denominate the Southern states—a dominance which the experience of a short time sufficiently showed to be disastrous beyond description—was violence, intimidation and fraud. But time developed a more effective method in accordance with forms of law. By 1876 the Southern states were once more in the hands of the whites. The nightmare of control by unprincipled whites and ignorant negroes, never to be forgotten by those who had suffered from it, was at last over. It was plain enough that the methods of liberation, however they might be justified by the plea of necessity, were dangerous in the extreme—were demoralizing to the white community itself. Thoughtful men therefore cast about for some method of legalizing the situation within the Constitution. Beginning with about 1890 various devices were found and adopted.

The payment of a poll tax was required, as many negroes, even if they paid the tax, were careless about keeping the

receipt, and a demand for that document would be sufficient to keep them from registry.

The prospective voter must be able to read the Constitution of the state, or to give evidence of understanding it when read to him. Few negroes could read, at that time, and the evidence of understanding had to satisfy the enrolling officers.

The "grandfather clause" was intended as a temporary measure to eliminate nearly all the blacks and as few as possible of the whites. By this clause none who had the suffrage in 1867, or their descendants, should lose the vote under any of the Constitutional qualifications—up to a year not far away.

Veterans of past wars and their descendants, up to a certain time, were exempted from other limitations.

An educational test—reading and writing—or as an alternative the possession of three hundred dollars worth of property—was also provided.

Nearly all the states of the late Confederacy (all but Florida) have adopted some or all of these restrictions on suffrage. How they have actually worked may be seen, for instance, in the record of Louisiana immediately before and after the adoption of the Constitution of 1898, in which the limitations for that state were adopted. January 1, 1897 the total number of registered voters was, whites 164,088, negroes 130,344. The next registration after the adoption of the Constitution was, whites 125,437, negroes 5,320.

Haworth in The Outlook, Vol. LXXI, p. 163

Figures which may be illuminating as contrasted with the above are those of debts of the Southern states as affected by negro domination. At the close of the Civil War the total debt of the eleven states was $87,139, 933. 33. The total debt after the orgy of reconstruction was $380,160,575.13.

Hamilton, Negro suffrage and Congressional Representation, p. 24

The Supreme Court of the United States has on the whole taken the view that the various suffrage limitations above noted do not contravene the Fifteenth Amendment, whatever their motive or effect. In 1914 the Supreme Court held

that the "grandfather clause" was unconstitutional, but this was practically immaterial, as such clause was intended for a temporary purpose and had expired in nearly all the states which had adopted it.

Williams v. Mississippi, 170 U. S. 213; Giles v. Harris, 189 U. S. 488

It has been pointed out that so far as the second section of the Fourteenth Amendment is concerned it is practically abrogated by the Fifteenth. The Fourteenth provides that disfranchisement on the ground of race, color or previous condition of servitude should involve reduction of representation in Congress and hence in the electoral colleges. But such disfranchisement the Fifteenth Amendment prohibits. Congress could hardly reduce the representation of a state for an unconstitutional act. So long as the Fifteenth Amendment is in force, then, the second section of the Fourteenth is null. Should the Fifteenth be repealed then the provision of the Fourteenth would at once revive. Some excellent lawyers do not accept this view, but hold that both provisions of law are still in force. The Supreme Court has as yet never had occasion to pass on the question, as no law disfranchising on the grounds prohibited has been adopted by any state. Such a law would be repugnant to the Fifteenth Amendment and void—a mere nullity. It is not altogether easy to see how Congress could act on reduction of representation in view of a legal nullity.

Guinn & Beal v. U. S., 238 U. S. 347

The negro of late years has been gaining in education and in the possession of property. It will be interesting to see what effect this situation will have on suffrage.

This Part of the Constitution a Dead Letter

But at present we have a clear case of a part of the fundamental law of the United States which is a dead letter, because it is aimed primarily at a section and in that section of the country the dominant intelligence and energy are practically unanimous in complete opposition to it and to all that it may imply. This matter of negro suffrage "in the minds of many people who feel most deeply, is above constitutional and legal sanctions, like religion. A very upright, law-

Porter, 207–8 Citing Proc. Am. Pol. Sci. Assn. II 164

abiding, honest, and highly moral person will ignore the law when it touches his religion. High minded abolitionists would countenance no law that protected slavery, regardless of its sanction. Just so with the Fifteenth Amendment: . . . Thoroughly righteous men in the South do not hesitate to evade the law despite its high sanction."

The Nineteenth Amendment

The Nineteenth Amendment prohibits any restriction on the basis of sex in suffrage laws. This is another step in withdrawing power from the states—power which was clearly among the reserved rights covered by the Tenth Amendment. Like the Fifteenth Amendment, also, it does not relate to suffrage at federal elections only, but enters into the states and dictates the basis of suffrage so far as this limitation is concerned, at all elections, state, county, city, as well as federal. It is an extreme case of derogation from the freedom of the state. If the states are to be "indestructible" there are surely some rights which should be left to them, and few can be more significant than the right to constitute their own electorate. But in these two amendments(XV and XIX) there has been forced on states which disapprove them a provision of law which goes to the very root of society itself.

Another Serious Infringement of State Power

So far as the sex limitation is concerned, that had already been removed from the laws of many states, and very likely in time would have been removed in all the states. But the eager proponents of the measure were not content to wait patiently for the growth of public sentiment. They preferred to force the change on states which were not ready to adopt it—force is so much easier, when available, than persuasion. But too much resort to force is not wholesome in a free land. It breeds sinister consequences.

The Seventeenth Amendment

The Seventeenth Amendment transferred the choice of the state representatives in the federal Senate from the state legislatures to popular election. If the Constitution is to prescribe the manner in which the states shall choose their Senate delegates, it probably does not matter whether

senatorial elections shall be direct or indirect. The Fifth Article of the Constitution leaves the far more vital function of sharing in the change of the organic law to the legislature, and the Supreme Court in the National Prohibition laws held that state attempts to secure even in part a popular vote on amendments to the federal Constitution are invalid.

The change was the result of long standing scandals attending legislative election—it is part of the steady process of taking power from state legislatures owing to the growing distrust of those bodies.

Comments

Whether in avoiding one set of evils others not wholly foreseen have not been incurred, is another question. It will hardly be claimed that the personal quality of senators has been bettered. The cost of popular elections, including the direct primary, is as prohibitive in general of the candidacy of a man with a slender bank account as at any time in the past with indirect elections. Scandals of a financial character already are not unknown accompanying the new method.

If the amendment gave the states the option of direct or indirect election—the Senators represent the states, and there seems to be no real reason for dictating how each state shall proceed in selecting its delegates—there would be less ground for objection. As it is, every state is compelled, with or without its approval, to follow one method and only one method. It is an instance of compulsion where compulsion is by no means essential to the general welfare. The presumption for the individual citizen is in favor of liberty—the presumption for the state should be in favor of state liberty, to act each in its own way.

Non-Voting

The two suffrage amendments add a large mass of people to the list of qualified voters. Whether they add proportionately to the list of actual voters is another matter. The Fifteenth surely does not, and by no means all enfranchised by the Nineteenth avail themselves of the privilege. Indeed

the number of non-voters of all classes is very large, and it is perhaps worth considering whether the proper basis of suffrage in a republic has been found when so many refrain from exercising the privilege.

Of course there is a marked difference in interest evinced at elections of different characters. A presidential election normally is attended by so much and so long continued discussion, so many appeals to party allegiance, to economic interests, to policies of the whole nation, that a comparatively large vote is secured. But even then there are many who do not vote. In 1920 only a little more than 49 per cent of the qualified voters cast any ballots.

There are the many instances in states of predominant party control in which doubtless large numbers are so sure of the result that, whether or not that result is satisfactory, they do not think their voting likely to make any difference. Were the margin smaller no doubt the attraction would be greatly enhanced.

There are well known cases, too, of election really of large importance, like the choice of judges, or the ratification of amendments to state Constitutions, in which the vote cast is almost always far less than at other elections. In either of these there may be at times particular reasons which stimulate interest and draw out votes. Still, even then the numbers seldom compare with that at far more ordinary elections.

These facts are so well known that evidence is hardly necessary. A few illustrations may be in point.

The total population of the forty-eight states, under the census of 1920, was 105,710,620—in round numbers, 106,000,000.

In the same states there were 54,345,913 who were citizens of the United States and twenty-one years of age or upwards. Practically all these were eligible to vote. In a few states the franchise is still extended to aliens who have taken out their first papers. Still, the number of such is not so great

that it is necessary to take them into account. The total number of potential voters then may be put at 54,000,000 in round numbers.

The presidential election calls out usually the maximum of interest. The year 1920 was no exception to that rule. The total number of votes cast for presidential electors was 26,786,398—approximately 50 per cent of the voters cast their ballots. Presidential Election of 1920

The population of the state of Minnesota in that year was 1,237,642. The total vote in that state for electors was 737,838. In 1922 the total vote for the choice of a United States Senator was 690,829, and in 1923, again for the choice of a United States Senator, the total vote was 504,795. Minnesota

The city of Chicago in 1920 had a population of 2,701,705, of whom 1,366,515 were qualified voters. At the presidential election of that year there were 785,195 voters. For mayor, in the spring of 1923, there were 716,893 votes, although 905,348 were on the registry lists. On the question of authorizing an additional tax for the public schools there were 352,307 votes cast. Chicago

The State of Illinois in 1920 had a population of 6,485,280. There were 3,462,443 qualified voters. The total vote cast for presidential electors was 2,094,714. At the same election an important amendment to the state Constitution was submitted, requiring a majority of those voting at that election. "Those voting at that election," in other words the greatest number of voters who cast a ballot at all, were the number above quoted as voting for presidential electors. A majority of that number was 1,047,358. The amendment provided an easier method of making future amendments—a reform greatly needed. Those voting in the affirmative were 242,519, those voting in the negative were 205,306, a total of 447,825. This fact hardly needs comment. Illinois

In 1918 there was held an election (June 3) for a judge of

Judicial Election in Illinois

the Supreme Court of Illinois in the Fifth District. At that election there were cast in the District 37,205 votes.

On November 5 following there was an election in the State of Illinois for a United States Senator. The same ten counties which formed the Fifth Judicial District above noted cast 67,841 votes for Senator.

In 1920 the same ten counties cast for Presidential electors 159,693 votes.

Springfield, Massachusetts

Springfield is perhaps a typical city of the best quality. Its population by the census of 1920 was 129,338. Of this number there were 68,336 citizens of the United States and 21 years of age or upwards. The number who were registered voters in November, 1920, was 35,017. The number of votes cast for presidential electors in that month was 30,499.

New York

The State of New York in 1920 had a population of those twenty-one years and over, thus eligible to vote, amounting to 6,092,276.

In that year only 3,543,956 were registered, and of those registered there were 2,893,672 who voted for presidential electors. The shrinkage, upwards of twenty per cent, seems too much to assign to merely fortuitous causes. There must have been more or less indifference.

Further Reasons for Non-voting

But it should be noted that the registration included not much more than half of the qualified voters—and that in a presidential year. Allowance must always be made for illness, for absence from home owing to considerations deemed to be of much personal importance, for change of domicile too late for registration, or for other practically insuperable causes. How much a difference is to be estimated as due to these influences it is obviously impossible even to conjecture.

Then too there are many voters on whom party obligations rest lightly, and who find themselves confronted by nominations between which they find no choice. In such cases they see no reason at all for voting.

There are many voters too who have become convinced

that politicians are after all very much alike, that it makes no difference which are chosen, that it is idle to try to discriminate among them, and still more idle to endeavor to get better nominations.

There must remain a large number who are more interested in their own personal affairs than in those of the public—who think, if they think about it at all, that it is by no means worth while to take the trouble to vote—and accordingly who seldom do vote.

Compulsory Voting

Some good people have suggested a legal requirement of voting—unless of course in case of imperative disability—and legislation to that effect has been enacted in Europe. It would seem, however, that the vote of most of those classes above noted, especially of those who lack interest in general or who have actually no choice as between parties or candidates, could have little value. It might be quite as well to cast lots for an election and done with it.

Merriam and Gosnell, p. 241 and notes

Still, the legal requirement of voting is often urged. Indeed, such suggestions are whimsically common. One thinks that people ought to do a certain thing which they apparently do not consider in the line of duty. Then by all means have a law made and have them compelled. In other words use force in order that my neighbors may have to do what I want them to do, rather than what they themselves wish to do. Incidentally this was almost exactly the mode of reasoning that inspired the Spanish Inquisition. Most conscientious servants of righteousness as they saw it, no doubt, those inquisitors—but we would think that the world had learned some lessons of tolerance since their time.

Perhaps some of the most vital reasons for non-voting may be summed up as follows: too many elections, too cumbersome ballots, too scanty results. People sometimes feel as if they were using artillery to shoot mosquitoes—and the mosquitoes are still in evidence.

At any rate little is to be gained in the direction of an in-

telligent and interested electorate by adding indiscriminate masses to the existing number. The two suffrage amendments are of this wholesale character—in neither is any attempt made at discrimination.

The Sixteenth Amendment

The sixteenth article of amendments was proposed by a Joint Resolution of Congress July 12, 1909, and was proclaimed as ratified by the constitutional number of states, February 25, 1913. Indeed, of the forty-eight states only four, New Hampshire, Rhode Island, Kentucky and Utah, rejected it. This amendment gives Congress power to provide by law for an income tax without proportioning it according to population, as required by the Constitution (Art. I, Sec. 9, § 4) for all direct taxes.

For more than a hundred years it was supposed that the federal government had this power. Acts of Congress and decisions by the Supreme Court were to that effect, until the decision of the Court in the cases of Pollock v. The Farmers' Loan and Trust Company in 1895 (157 U. S. 563, 158 U. S. 620). This decision of the Court by a divided vote (5 to 4) held that the act of 1894 so far as the income tax was concerned was unconstitutional because it was a direct tax and not levied among the states in proportion to population.

The distinction between direct and indirect taxes made in the Constitution apparently was not based on any definitely accepted principles of political economy as understood in 1787. That poll taxes and taxes on land and its appurtenances were direct seemed clear—the acts of 1798, 1813 and 1816 laid such taxes and apportioned them among the states according to population. As appurtenances to land, slaves were taxed by these laws—some states held slaves to be real estate. But what other taxes might be direct no one knew.

Knowlton v. Moore, 178 U. S. 41

The Constitution requires that "duties, imposts and excises," whatever those kinds of taxes may be, shall be uniform through the United States—that is, shall be levied at the same rate in each state.

The Constitution also requires that no capitation or other direct tax shall be laid unless in proportion to the census, and that no tax or duty shall be laid on articles exported from any state.

The three constitutional principles of federal taxation, then, are: uniformity of "duties, imposts and excises"; direct taxes based on population of any state, slaves to be counted as three-fifths; no export taxes.

Direct taxes in the sense of the Constitution, were imposed by the Acts of 1798, 1813, 1816, 1861, 1864, 1865, 1866, 1867, 1870. Income taxes, supposed when enacted to be indirect and therefore properly levied on the principle of a uniform rate and not on that of distribution among the state according to population, had been imposed at different times by thirteen statutes. The validity of such statutes had been upheld repeatedly by the Supreme Court of the United States, notably after the Civil War in the case of Springer v. U. S. (102 U. S. 586). The Court held that only poll taxes and taxes on real estate were direct.

In 1895, however, the Court took another view of the matter, deciding that a tax on the income of real estate was virtually the same as a tax on the real estate itself, and hence was a direct tax—that a tax on personal property would be a direct tax and that a tax on the income of personal property, really equivalent to a tax on the property, was also direct. Therefore all such income taxes should be apportioned on the principle of population, rather than uniformity. The statute of 1894, levying income taxes on the basis of uniformity, accordingly was held unconstitutional and void.

An income tax levied among the states according to population would be inequitable in the respective amounts assessed, would be obnoxious in the widely varying rates in different states, and would be difficult of collection. If the Congress is to lay a tax on incomes at all then it should be on the basis of uniformity. This was the general view

throughout the country, and was embodied finally in the Sixteenth Amendment, ratified nearly twenty years after the decision of the Court in the Pollock case.

That an income tax is a legitimate source of public revenue is undoubted, whatever may be the infelicities which are apt to accompany it. The only question is whether it should belong to the federal government as well as to the states. There has been no responsible suggestion that it should not be in the power of the states. Until the Revenue Act of 1894 which the Supreme Court held repugnant to the Constitution, federal income taxes had been laid only as a result of war emergencies. That act, however, and revenue acts on the basis of the Sixteenth Amendment, have made such taxes a source of ordinary revenue of the federal government. Indeed in the estimate for the fiscal year ending June 30, 1925, income and profits taxes form a half of the ordinary receipts expected—$1,800,000,000 out of $3,693,762,078 (Federal Budget Estimate for 1925).

Is it safe and wise to intrust the Congress with this power of almost illimitable taxation? Would the federal government be seriously hampered if the power were withheld? These are two questions which deserve thoughtful consideration.

Perhaps it would not be inadvisable if the Congress should find it a bit more difficult to find funds available for the many legislative purposes. The history of legislation and some of its motives are not altogether unknown. A national budget is rather recent as an actual policy—for long years the custom was for many committees to recommend expenditures and then for the Congress to provide for as many of them as might seem practicable. Log-rolling is a process fairly well understood—members interchange votes for measures in which they are not interested in order to insure the passage of measures in which they are interested. The alleged improvement of rivers and harbors has cost vast sums, for pur-

poses not always of real value. Apparently innocent undertakings of that character at times have proved to be initial commitments necessitating continual expenditures for completion. Enormous pension appropriations, unnecessary, undesirable from the point of view of the national interest, have been made repeatedly in order to secure votes for the return of members. Public buildings have fallen like manna from the skies—rather perhaps like rain, on the just and the unjust alike.

If the Sixteenth Amendment had not been adopted the Congress would not have been prevented from enacting an income tax. But it might have been deterred from such enactment by the inconveniences and other infelicities of the method of apportionment. Perhaps more attention might be given to cutting down expenditure—which would be far more to the point.

It is true that war time needs are imperative and that in such emergencies the government should not be hampered in securing funds. But it is also true that popular support of war sweeps away ordinary objections to taxation, and that apportionment among the states of an income tax under such conditions might not meet with any material difficulty.

Indeed it ought always to be difficult for the Congress to provide the means of ordinary expenditure. Such expenditures would be for entirely well known objects, and the taxes for those objects should come as directly as possible from the pockets of the taxpayers. If the contrary is true—if it is easy for the federal legislature to get funds and if the source of those funds is obscurely related to the individual expenses of citizens, there is every inducement for Congressional lavishness; and the pressure on Congressmen from many sources for appropriations is almost irresistible. *Non possumus* would be a very comfortable answer to many who are so hungry for public funds. It is well to have taxes obviously obnoxious. It seems to be thought by some that if Congress

is denied this power incomes will escape taxation. But with or without the power being vested in Congress the states have the undoubted power to levy such taxes. Without the Sixteenth Amendment the states would have such power exclusively, as one reserved, according to Amendment X. With the Sixteenth Amendment the power is concurrent—it may be exercised either by the Congress or by the states, or by both at the same time. The states are free to act as they see fit in the matter. But meanwhile by the amendment the states lose exclusive control of this particular field of taxation, and to that extent the amendment derogates from state reserved rights.

CHAPTER V

HAS THE FEDERAL EQUILIBRIUM BEEN MAINTAINED?—CONTINUED. SOCIAL LEGISLATION

The Eighteenth Amendment

Another law which is not easily enforced is founded on the Eighteenth Amendment to the federal Constitution.

This amendment, in place of being in protection of liberty, as with others, is a limitation in liberty. It is therefor worthy of some detailed study as to the causes and methods which led to its adoption.

This article of the Constitution prohibits the manufacture, sale or transportation of intoxicating liquors within the United States, or the importation or exportation of the same, for beverage purposes. Obviously it is left to the legislative power to define "intoxicating liquors." This had been done by statute of Congress. No doubt state statutes could add to the strictness of federal definitions, but could not lessen such definition.

Intemperance

The intemperate use of alcoholic liquors has long been recognized by reasonable people as a great evil. There have been periods in history when such excess was especially prevalent. Perhaps the eighteenth century in England presents a case in point.

England in the Time of George II

Dr. Creighton, in his History of Epidemics in Britain, says (II. 84):

"The great epidemic of fever in 1741–2 was the climax of a series of years in London all marked by high fever mortalities. If there had not been something peculiarly favorable to contagious fever in the then state of the capital, it is not likely that a temporary distress caused by a hard winter and a

deficient harvest following should have had such effects. . . . Drunkenness was so prevalent that the College of Physicians on January 19, 1726, made a representation on it to the House of Commons through Dr. Freind, one of their fellows and member for Launceston:

"'We have with concern observed for some years past the fatal effects of the frequent use of several sorts of distilled spirituous liquor upon great numbers of both sexes, rendering them diseased, not fit for business, poor, a burden to themselves and neighbors, and too often the cause of weak, feeble and distempered children, who must be, instead of an advantage and strength, a charge to their country.'

1794 "'This state of things' said the College, 'doth every year increase.' Fielding guessed that a hundred thousand in London lived upon drink alone; six gallons per head of the population per annum is an estimate for this period, against one gallon at present."

Traill's "Social England" discusses the same period (V. 136): "It is quite what might be expected that the English who since the Restoration had been displacing Danes and Dutch in reputation as topers [1] now fell into the worst of all drunken habits—the habit of gin drinking. Till 1723 this vice remained a privilege of the rich, for brandy and rum were dear; brandy as an import from France being heavily taxed, and rum being a protected colonial product. But now the distillers began to produce whisky and gin. . . . The consumption of British spirits had been in 1727 three and a half millions of gallons, and in 1735 nearly five and a

[1] In 1689 the English parliament adopted a mutiny act, by which the army at all times, whether in peace or in war, could be controlled by martial law. Macaulay (History of England, vol. II, ch. XI) points out a significant fact: "A clause, which illustrates somewhat curiously the manner of that age, was added. This clause provided that no court-martial should pass sentence of death except between the hours of six in the morning and one in the afternoon. The dinner hour was then early, and it was but too probable that a gentlemen who had dinner would be in a state in which he could not safely be trusted with the lives of his fellow creatures."

half; by 1742 it was 7,162,000. But the retailers continued to offer men to be 'drunk for 1 d., dead drunk for 2 d., and straw for nothing.' The increase of robbers, the growth of pauperism, the appearance of new diseases, were all ascribed to gin. In 1743 the duty was dropped to 1 d. a gallon; by 1751, when the maximum was reached, the consumption was 11,000,000 gallons, the number of gin shops . . . was said to be 17,000; and London and the great towns long continued to be 'more like a scene of a Bacchanal than the residence of a civil society.'"

It had been 20s.

Previous ages and other countries, however, had displayed as dark a view. Motley pictures society in the Netherlands soon after the middle of the sixteenth century. "The morals of high society were loose. Gaming was practiced to a frightful extent. Drunkenness was a prevailing characteristic of the higher classes. . . . Their constant connection with Germany at that period did not improve the sobriety of the Netherland nobles. The aristocracy of that country, as is well known, were most 'potent at potting.' 'When the German finds himself sober,' said the bitter Badovaro, 'he believes himself to be ill.'

Motley, Rise of the Dutch Republic, Pt. II, C. I., p. 254

". . . These disorders among the higher ranks were in reality so extensive as to justify the biting remark of the Venetian, 'The gentlemen intoxicate themselves every day,' said he, 'and the ladies also; but much less than the men.'"

One does not need to go so far afield for evidence of excess in the use of intoxicants. In every age, in every clime, among every people, something of the sort, in varying degrees, has been noted. Northern peoples, rightly or wrongly, have the reputation of an inclination to drunkenness beyond that of those in Southern climes. Perhaps the latter have other forms of over-indulgence. Certainly savages in America and Africa notably have been victims of the white man's rum and whisky, and have been destroyed by drunkenness perhaps quite as much as by their own witchcraft and tribal

wars. But we are all quite familiar with alcoholism in our own time and among our own people. The craving is no respecter of persons.

Schouler, Hist. of U. S., III, 523

Schouler paints a vivid picture: "Prior to 1825 the use of ardent spirits in the United States was almost universal, and intoxication might be pronounced the national vice. At the chief colleges liquor was openly sold from the booths on public days, and municipal authorities would provide free punch for those who marched on a training day. The clerks in the country store mixed their toddy together at noon, retailing liquor to customers for the rest of the day. The thirst of travelers by the wearisome stage and steamboat was proverbial. The office of an inn was styled the bar-room, and on the dinner table stood decanters of brandy free to the guests." Indeed the pastor in his parish calls expected to be refreshed with rum or whisky, and the laborers in the harvest field were encouraged to speed because they knew that at one end of the field whisky jugs under the bushes waited each round.

Temperance Reform

The temperance movement in the United States has a long history. It may be considered as following two lines of endeavor—seeking to influence individuals to abstinence from intoxicating liquor, and endeavoring to secure legislation in restriction of its manufacture and sale.

Total Abstinence

The total abstinence campaign took various forms. Sermons, lectures, pamphlets, were numerous. Churches became interested. In the early nineteenth century the pastor on his parish calls was welcomed with whisky or rum. By the end of the century most pulpits thundered against the liquor traffic. Organized societies, the Sons of Temperance (1842), for instance, made abstinence from liquor the essence of their pledge. Regalia and ritual were fashioned to attract members, and zealous propaganda of temperance animated the formal meetings. All this had a marked effect on the habits of the people. More and more the intemperate use of liquors came to have a social stigma—drunkenness became a

disgrace, increasing numbers of people practiced total abstinence.

One reason went far to make such change in personal habits leading to abstinence, or at least to temperance. Life became very complex. Business came to have many delicate and absorbing implications, science was developed as the handmaid of industry, and neither business nor science could tolerate drunkenness. All demanded, by the sheer necessity of the case, a cool head, a steady hand. Mere oratory might perhaps coexist with the effects of cocaine or opium or alcohol, but the pressing affairs of modern civilization cannot be directed by semi-inebriates.

There is always one obstacle in the way of any permanent reform in social habits—the fact that the generations succeed one another so rapidly. A new world of young people displaces their elders—the latter have learned by long and often bitter experience the value of prudence and sobriety—the former look out with fresh ignorance on a new world and have to learn the lessons of the past all over again. Experience of their own they have not, the experience of their predecessors makes little impression on them. Life is a constant flux, not long being, but always becoming.

Of course the early days of a new reform are often most flourishing. The total abstinence cause in the United States perhaps dates in an organized form from 1824, in Boston, and in the next few years it had a rapid growth. It is estimated that by the end of 1829 more than a thousand temperance societies were formed. "The importation of spirits in the United States, which was over $5,000,000 in 1824, fell by 1830 to about $1,000,000. More than fifty distilleries were stopped; hundreds of merchants renounced the traffic. Through these organized efforts a great social improvement was visible." Schouler's U. S. Hist., III, 524

But opponents of intemperance were not content with persuading people to disuse intoxicants. At an early period they Legal Prohibition

set out to secure legislation prohibiting the business of purveying liquor in any form.

The Maine Law

1846

1858

The State of Maine was the first to enact such a law, and for a long time the "Maine Law" was a term symbolical of drastic legal action, and was the ideal of the extreme temperance advocates. The first law dated from 1846, but it was ineffective, and further legislation was vetoed by the governor. An effective law was passed in 1851. This in turn was repealed five years later, but in 1858 was reënacted and from that time has been permanent state policy. It was embodied in the Constitution of the state in 1884, by an overwhelming popular vote (70,000 to 23,000).

The Maine Law of 1846 excited much interest in temperance circles and seemed to point the way to a more effective method of dealing with the drink evil than had been found in securing pledges of total abstinence from individuals. The latter methods depended for its success wholly on persuasion and of necessity involved a constant process of seeking the adhesion of continually changing members of the body politic. The new method sought to compel temperance by endeavoring to cut off the supply of intoxicants at the source. In short compulsion reënforced by the sanctions of law was thought to be a quicker and more effective means than the "sweet reasonableness" of the appeal to individual conscience and good sense.

Resolution in Favor of State Prohibition 1850. Wooley, p. 129

At the National Temperance Convention at Sarotoga Springs, N. Y., in August, 1850, the following resolution was adopted:

"Resolved: That the principle assumed and carried out in the Maine Law, that spirituous and intoxicating liquors kept for sale, as a beverage, should be destroyed by the state, as a public evil, meets the approbation of this convention as consonant with the destruction of the implements of gambling and counterfeiting, of poisonous foods, infectious hides, and weapons of war in the hands of an enemy; that if the liquor

destroyed is private property, it is only so as are the implements of the counterfeiter, dangerous and deadly to the best interests of the community; that its destruction is no waste of the bounties of Providence, more than the destruction of noxious weeds, while its very destruction enriches the state, exceeding the amount for which it could have been sold. It tends to put an end to all subterfuges, fraud and secret sales, and to the demand for it in the community. It makes the state a perfect asylum for the inebriate. It is a solemn manifestation to the world of the vile and worthless nature of the article destroyed, and an unmistakable token to the vendor of the end to which a righteous public sentiment will ultimately bring his business. For these and other reasons the Convention gave it their hearty approbation, and they do strongly recommend to all the friends of temperance to cherish it as the sure and only triumph of their cause, and continually to urge its adoption upon every legislature."

The above resolution is significant as embodying the essential policies since followed by the advocates of legal prohibitions. It will be seen that it implies two quite distinct doctrines.

The first is that the manufacture and sale of intoxicants for beverage purposes should be prohibited by law. At that early date it was not realized that the enforcement of such legal inhibition would involve material difficulties—difficulties which became apparent not long after in the State of Maine.

The second doctrine was that there should be no compensation for those whose property might be destroyed by prohibitory statutes—such property being held analogous, for instance, to the apparatus of counterfeiters.

Such logic is obviously that of emotion rather than that of reason. It could hardly be maintained that counterfeiting had ever been recognized as a legitimate transaction—had ever been licensed by act of Parliament or of Congress, or of

state legislatures. Known counfeiters had hardly held a reputable station in society, had not been made deacons or elders in the church, had not shown their generosity by imparting openly of the products of their industry to churches and orphan asylums.

In fact the many millions of dollars invested in breweries and distilleries and vineyards in 1850 were so invested quite openly, and were taxed on the same basis as other property, and had the same police protection. The theft of a cask of beer if detected would land the thief in jail—a counterfeiter would not be likely to call in the police if he should lose some of his choice dies.

New York Act for Prohibition Without Compensation Unconstitutional, 1856

This was the view of the Court of last resort, the Court of Appeals, of the State of New York in 1856. A prohibitory act, without compensation, had been adopted by the legislature of that state in 1855. The state Constitution provided that no person should be "deprived of life, liberty, or property without due process of law." Prohibition as applying to the future was within the police power of the state, but the destruction of existing property values by legislation was deprivation of property without due process of law. Hence the prohibitory statute was repugnant to the Constitution of the state and therefore void.

Success and Failure

The decade immediately preceding the Civil War was marked by great activity on the part of prohibition advocates, attended by many successes and then by an adverse tide of failure.

The example of Maine (1846) was followed in a few years by all the other New England states—New Hampshire in 1849, Massachusetts, Rhode Island and Vermont in 1852, and Connecticut in 1854.

Meanwhile the same tide of prohibition sentiment swept the states of the old northwest territory, where New England settlers had carried New England modes of thought—Ohio, Indiana, Illinois, Michigan and Wisconsin,—and also the

states beyond where the same migration had carried the same ideas—Minnesota, Iowa, Nebraska. Between 1850 and 1855 some sort of prohibition legislation had carried in the legislatures of all these states.

Thus by the middle of the decade nearly all the northern free states had attempted to deal with intemperance by state wide prohibition legislation. In the first flush of the reform enthusiasm all opposition was overborne and it seemed as if the people as a whole had made up their minds that drunkenness must go by the destruction of its causes.

But the conquest of the popular mind by the temperance doctrines after all proved to be temporary and illusory. There was in fact a deep seated opposition to the extreme legislation of prohibition—an opposition no doubt partly stimulated by the financial interests involved in the traffic, but at the same time made effective by very general sympathy with anti-restrictive views.

In New York and Indiana the statutes were in conflict with the state Constitutions and hence were declared invalid by the Courts, and there was not enough public sentiment in favor of the Maine law to alter the Constitutions.

The Wisconsin bill was vetoed by the governor, and it was not passed over his disapproval. In Minnesota and in Illinois the act of legislature was submitted to the people for ratification and was defeated at the election.

In nearly all the other states the statutes were soon repealed—Illinois 1853, Delaware 1857, Nebraska 1856, Rhode Island 1863, Pennsylvania 1866, Massachusetts 1868, Conneticut 1872, Michigan 1875.

Nearly all the northern states had seemed to favor prohibition laws, but of them all in the end only Maine, New Hampshire and Vermont remained—though both the latter 1903
states repealed these laws in a later year.

Pennsylvania sought to ascertain the popular will in advance of legislation. In 1854 (April 28) the legislature of that

state passed an act "For the Suppression of the manufacture and Sale of Intoxicating Liquor as a Beverage," which however in fact provided for an election at which the voters of the state should express their opinion on the subject. The preamble to the act was as follows:

"*Whereas*, All laws to be efficient should have the approbation and sanction of the people.

And whereas, It is represented that a large number, if not a majority of the citizens of this Commonwealth are deeply impressed with the necessity of the passage of a prohibitory liquor law,

And whereas, It is impossible to obtain a certain indication of popular sentiment thereto by means of petitions and remonstrances, therefore," etc.

Pa. Archives, Papers of Governors, VII, 743

At the election in the following October there were 158,342 votes cast for a prohibitory law and 163,520 against it. Accordingly in 1855 a license law was enacted, which had the caption "To restrain the sale of intoxicating liquor." The referendum vote was of course by no means itself legislation, but merely an expression of opinion on the part of the electorate, and the legislature acted in accordance therewith.

Local Option in Pennsylvania 1846 Unconstitutional, Parker v. Commonwealth, Pa. State Reports, Barr VI, 507

There had been a previous attempt by the legislature of Pennsylvania to relegate the question of license or prohibition to localities throughout the state (Act of April 17, 1846)—the well known local option system—but in the following year (Oct. 11, 1847) the Supreme Court of the state decided the act repugnant to the Constitution and hence void. This was on the ground that by the Constitution of the state the legislative power was vested in the legislature, and that body could not delegate it—that local option practically was a delegation of the power to the various localities. There had been a previous decision of the Pennsylvania Supreme Court to the same effect, on another matter at issue.

Pa. Cases 5 Watts & Sergent, 283

A few years later a similar view was taken by the Supreme

Court of Indiana. The Court made the following statement as to the constitutional principles involved:

Indiana Supreme Court, Nov. 1853. Maize v. Indiana, Ind. Sup. Ct. Rpts., IV, 342

"The law making power being vested by the constitution of 1851 in the general assembly, the exercise, by any other body, of the power to make, sanction, suspend, or give effect to, the laws, is necessarily excluded.

Submitting laws to the vote of the people in their primary capacity is subversive of the representative system and inconsistent with the constitution."

So much of the act of March, 1853, "to regulate the retailing of spirituous liquors" as related to a popular vote, therefore, was held to be in conflict with certain sections of the Constitution of the state and so void.

Beebe v. The State, Ind. Sup. Ct. Reports, VI, 501

A subsequent restrictive liquor act of the legislature (1855) was in part held void by the Supreme Court of Indiana as destroying the fundamental right of the citizen to hold property.

Delaware 1847

Delaware had had a similar experience. A Local Option law (Act of Feb. 19, 1847) was almost immediately brought before the Courts, and the Court of last resort, in an exhaustive opinion, declared it void as being a delegation of legislative power to the counties. This left the former license law in full effect.

Rice v. Foster, Barrington's Reports, IV, 479

Various restrictive laws, by no means approaching the sweeping negatives of the Maine law, were made experimental in some states. In 1851 the Illinois legislature passed an act "to prohibit the retailing of intoxicating drinks." This statute forbade the sale of liquors in quantities of less than one quart, excepting only the sale by druggists and prescriptions by physicians for specified purposes. The law proved wholly unenforcible and soon became a mere nullity in practice. It was repealed at the next session of the legislature (1853). At the next following session (1855) another act was adopted "for the Suppression of Intemperance." This measure prohibited the sale of intoxicating beverages, with

Illinois 1851

Centennial Hist. Ill., III, 207

Restrictive Act of 1855

certain interesting exceptions and on a significant condition.

The exceptions were three.

Prohibition did not apply to cider and wines produced in the state from domestic fruits and sold in a quantity of not less than one gallon.

Nor did it apply to beer, ales, etc., produced in the state and sold in a quantity of not less than 30 gallons, nor to wines and liquors imported into the state and sold in the original packages. The obvious intent of the law was to wipe out drinking places, but not to interfere with drinking in the home or in clubs.

The Quincy (Ill.) Whig of Jan. 29, 1855 gives the debate, from the Illinois State Journal

The condition was that the act should be approved by the people of the state at a special election in June. Obviously the Illinois legislators were not deterred by the views of the Courts of Delaware, Pennsylvania and Indiana above cited. In the lower house an amendment was indeed offered to strike out the section referring the act to a popular vote, on the ground of its unconstitutionality, and the point was argued at some length, It was said in reply that without the plan for popular reference the bill would not pass, and the friends of the measure accordingly voted down the amendment. Another amendment providing that the act should go into effect in the year 2000, and another that the Courts should not hold a man to be drunk unless he lay on his back and felt up for the ground, were also defeated.

Defeated by Popular Vote

The election was held and a majority of more than 14,000 was recorded against the restrictive statute. It would be interesting to know what would have been the view of the Illinois Supreme Court had the election gone the other way.

Similar Restriction Elsewhere

In several other states restrictive laws like that proposed in Illinois in 1855 were enacted (e. g., Indiana, 1855), but so far as lessening the quantity of alcoholic drink consumed was concerned the effect was not noticeable. Mississippi in 1838 limited lawful sales to a minimum of one gallon, but this ap-

parently proved an inconvenient unit, as the act was repealed four years later.

Michigan Constitution of 1850

The State of Michigan was early to embody statewide prohibition in its fundamental law—"The Legislature Shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors" (Constitution of 1850, Art. IV, § 47). Evidently the Legislature considered this constitutional restriction on their powers as open to interpretation, for in 1853 a law was passed providing for the sale of spirits, wines and other intoxicating liquors "for mechanical and medicinal purposes and no other." This act had the rather odd provision that it should be referred to a popular vote—that if the majority approved then it should take effect December 1, 1853, but if a majority should disapprove, then the act should take effect March 1, 1870. The validity of the law was considered by the Supreme Court of the state (People v. Collins, 3 Mich. 343) and the Court was equally divided—four judges holding the law to be in accordance with the Constitution, and four holding that it was a delegation of the power of legislation and so void. The Delaware case (Rice v. Foster, supra) was cited by one of the latter group of judges as especially pertinent and embodying an exhaustive and cogently reasoned opinioned. The judges were unanimous in holding that "the power of enacting general laws cannot be delegated by the legislative body even to the people." But it was the contention of the four who sustained the law that there was in it no delegation of power—that the election was a future event which was to determine the time at which the act was to go into effect. One of the other judges raised the question as to the effect of a tie vote at the election. Of course with a tie vote in the Court the statute stood. But a tie vote by the people would certainly have produced a whimsical situation.

Act of 1853

Two years later this act was repealed and one of wider latitude took its place. The act of 1855 permitted the sale

"Wide Open" Act of 1855. Restriction Repealed 1875

of alcohol of commerce not less than 80 per cent pure, of domestic cider in quantities of not less than ten gallons, of domestic wines in sales of not less than one gallon, and of foreign liquors imported into the United States and sold in their original packages. Apparently these permissions were not regarded by the law-making body as granting a "license" in the sense of the Constitution. But in 1875 a constitutional amendment rescinded § 47 of Art. IV of the state Constitution.

Albany (N. Y.) Journal

Daily Press, Chicago, Mch. 22, 1855

The years from the enactment of an effective prohibition law in Maine (1851) to the Illinois fiasco in 1855 were filled with discussion and action on temperance legislation. In 1852 acts were passed by the legislatures of Minnesota (Territory), Rhode Island, Massachusetts and Vermont, in 1853 by the legislature of Michigan, in 1854 by the legislatures of New York, Ohio, Wisconsin, Rhode Island again and Connecticut. It was said to have been the subject of discussion in the legislatures of nearly all of the northern states and also in those of Delaware, Maryland, Virginia, South Carolina, Georgia, Kentucky and Texas.

Minnesota Act Void

Folwell, I, 264

Legislative action, as has been seen, was not always effective in securing legislation. The view of the Supreme Courts has been noted in the cases of Delaware, Pennsylvania and Indiana. The Supreme Court of the Territory of Minnesota took a similar view. The act in that state (1852) was made dependent on the vote of the people, and was ratified by a popular vote of 853 to 662. A few months later as soon as a case reached the Supreme Court the act was held void on the ground that the act of Congress organizing the territory vested all legislative powers in the two Houses of the legislature, and that that body could not delegate its powers.

In New Hampshire, Maryland, and Pennsylvania the two houses failed to agree (1854), and in New York (1854) and in Wisconsin (1855) the bill was vetoed by the governor, and in each case failed to pass over the veto.

The Maine law of 1851 was the prototype of these various prohibitory acts, and usually they followed the Maine principles. The Act was entitled "An Act for the Suppression of drinking houses and tippling shops," and was primarily intended to destroy such places, but by no means forbade drinking intoxicants. Indeed the interest of the farmer vote was carefully guarded by excepting cider made from domestic apples, and by allowing the sale of that homely beverage in lots of not less than five gallons each. The license law of 1856, which on the whole opened the doors again by providing licenses for innkeepers and by exempting imports from foreign countries if in the original packages, still retained the prohibition of "drinking houses and tippling shops." The Act of 1858 returned to the principle of prohibition and has been followed since. But in that act, there was the same tenderness for the farmer exhibited in the exemption of domestic cider and wine. There was also exemption for intoxicants used for medical and sacramental purposes and the like.

The Maine Laws

This act of 1858 was accompanied with a reference to the people at a special election. If the popular vote should be adverse the act was thereby repealed and the act of 1856 restored. Otherwise it was the license law of 1856 which would be repealed. Perhaps this popular vote was in the nature of the expression of an opinion merely, thus escaping the dangerous delegation of powers—but as the validity of the statute was made dependent on the opinion of the electors the difference does not seem very significant.

Popular Vote Maine 1858

The wave of prohibition sentiment which seemed likely to sweep over nearly all the states in the early fifties had rather definitely receded. The prohibitionists had failed to keep many states which they had apparently won, and had failed to secure others. Maine was indeed the only permanent conquest. So striking a change in the ideas and habits of the people at large could be expected only if backed not by narrow majorities but by an overwhelming popular sentiment.

No such sentiment existed, as will be very plain by referring to the popular vote in Pennsylvania and Illinois above noted.

Meanwhile the public mind was filled with the events which were fast leading to the great Civil War, and in the pressure of that struggle of arms the liquor question almost disappeared from view.

The Campaign for Legal Restriction Renewed

After the confusion and excitement of the Civil War period had measurably passed away those interested in the temperance reform resumed their activities. While in general the aim was legal restriction rather than for individual abstinence, at the same time there were many different organizations effected, and quite different and at times somewhat discordant purposes were sought.

Organizations

Perhaps the most significant of the temperance organizations were the Woman's Christian Temperance Union (1874), the National Prohibition Party (1869), and the American Anti-Saloon League (1895).

W. C. T. U.

The Union planned and carried out a large variety of efforts, preventive, educational, evangelistic, social, legal, and organization. Woman Suffrage was quite naturally made a prominent part of their program, and their influence became widely extended and effective.

The Prohibition Party

The Prohibition Party never secured any electors in Presidential years, but it did divert many votes from the old parties, especially from the Republican Party, and claimed credit for the defeat of the Republican candidates in 1884. The Democratic platform in that year was explicitly opposed to prohibition, while that of the Republicans took ground that the question was a state and not a national issue. It is quite true that many former Republicans voted for the Prohibition Party candidates in that year, but it is far from certain that many more would not have been repelled by endorsement of a prohibition national policy. In any event there were other perplexing issues at stake, all of which had their influence in defeating Mr. Blaine.

Anti-Saloon League

The Anti-Saloon League set out to abolish the saloon, and when restrictive laws were adopted, to see to their enforcement. The League by no means forms a separate party, but works through any existing parties, seeking the nomination and election of candidates who are pledged to anti-saloon policies, and using effective measures to secure the votes of members of legislatures on anti-saloon measures. The policy of support on a single issue naturally at times leads to some weird results.

Restrictive Measures

The various restrictive measures adopted in the last few decades have been high license, local option, prohibition statutes and prohibition amendments to the organic law. Back of these have been the active work of organized bodies, usually with salaried officials, and a public sentiment after all based on the churches.

On the other side the only organized action was that of those financially interested in some form of the liquor business. The large bodies of people who did not believe in the policy of legal restriction or perhaps in total abstinence at all were not organized and therefore had no official exponents of their opinions. The liquor dealers naturally had only a moderate influence, and a positive policy is obviously more attractive than one of negation, especially when with most of its adherents really a matter of conscience.

High License

The theory of high license was that the high fee required would lessen the number of saloons, would put them in more responsible hands, would thereby lessen the quantity of liquor consumed, and would diminish crime, as much of it was connected with low groggeries. The fee in Nebraska, which was the first state really to adopt the system (1881), was $500 in small places and $1000 in larger cities. This example was soon followed by a number of other states. Coupled with the high license fee were various restrictions as to time of sale, and as to the location and conduct of saloons. Many temperance men favored this solution of the question.

The results were not what were expected. Restrictions were largely evaded, numerous unlicensed saloons sprang up, quite as much liquor was consumed and crime was not lessened. In a word, while the license fee was collected from the larger dealers and afforded a material support for the public treasury, the law otherwise was found unenforcible—and a law habitually unenforced is worse than no law. In the end few temperance advocates were found to defend the policy of high license. Perhaps had it been rigidly enforced there would have been a better record. But it is often easier to enact a law than it is to put it into operation.

Local Option

In the course of discussion and action on the question of prohibition laws there soon appeared in many states the fact that communities within the state differed widely in opinion. Some communities were by a large majority for prohibition, others quite as strongly against it, and others were divided in sentiment. On the whole cities and large towns were apt to be opposed to prohibitory laws, while rural districts and small towns were usually in favor of them. It seemed then proper in many states to make it possible for localities to decide for themselves which policy should be in force within their respective areas. This was in lieu of forcing on a community a status in the social practices of its people contrary to their positive convictions. Moreover it is always much easier to enforce a law which is supported by the whole weight of the immediate population than if some extraneous authorities set to work to force obedience on a neighborhood in which very few regard the law with respect. A long experience of society with such laws has made this very plain.

Accordingly in many states local units of government were given the option of deciding for license or no license. In some states these were counties and others towns, townships, or cities. There were some difficulties in county option if the county contained a large town. However by 1908 nearly three-fourths of the states of the Union were under some

Woolley, p. 167 sq.

form of local option, and in local option states the prohibition areas were steadily increasing until the license areas had shrunk to decided minorities.

State Prohibitory Statutes

The renewed activity of temperance organizations following the Civil War, backed as they were by many churches, comprising in their membership a large proportion of the whole population of the nation, led to legislation of a restrictive character in many states. Naturally local option was easier to attain than statewide prohibition, and successively many states adopted that policy.

Former Slave States

Another factor had much influence in certain parts of the republic. States in which there was a large negro population found that intemperance made these people not only useless but in many cases dangerous, and the white people, themselves controlling the elections, were inclined to prohibition in self defense. All the slave states of 1860, excepting only Delaware, Kentucky, Louisiana, Maryland and Missouri, sooner or later adopted prohibitory laws—Florida by constitutional amendment. Of the five exceptions Missouri alone maintained the license system, the other four having chosen local option. In these local option states the greater part of the area voted against liquor.

The World War

The World War gave a great impetus to the prohibition movement. The obvious ill effects of intoxicants on those vested with military or naval responsibility, the reports current of excessive drinking among Russian officers during the war with Japan, the prohibition of vodka by the Tsar on the outbreak of the Great War, all tended to aid the prohibition cause. No less than ten states adopted prohibitory amendments to their Constitutions after the fatal summer days of 1914, and as many more passed prohibitory statutes.

Federal War Time Legislation

When the United States entered the war, in the spring of 1917, the Congress almost immediately enacted a series of statutes relating to intoxicants. The sale of liquors to members of the army or navy was forbidden (May 18 and Oct. 6,

1917). In order to conserve food material the use of "foods, fruits, food materials and feeds in the production of distilled spirits for beverage purposes" was prohibited. The use of the mails for advertising intoxicants was withdrawn, and drastic prohibitory laws were adopted for the federal territories and for the District of Columbia. That was as far as Congress could go under the Constitution as it was at that time. The war power, the power over the mails, and the power over the territories, were the only legal sources of federal legislature on this subject.

Nature of State Prohibition

As has been noted, the southern states very generally adopted no-license statutes, while the states which preferred constitutional prohibition were nearly all west of the Mississippi River—Maine (1851) and Michigan (1918) were the only northern states east of the river in the list.

It will at once be seen that the large cities were, even at the end of the great war, quite non-prohibition in sentiment and practice—Boston, New York, Philadelphia, Chicago, St. Louis, New Orleans, San Francisco, and many more.

In other words, even without the aid of the war psychology, state prohibition was strong in most of the old slave states, in most of the Rocky Mountain and Pacific coast states, and especially in states with a relatively small urban population.

The Police Power

Freund, p. iii

Prohibition laws are all based on the police power of state or nation. The police power has been defined as "the power of promoting the public welfare by restraining and regulating the use of liberty and property."

Various state enactments, whether constitutional or statutory, recite a similar interpretation, e. g.:

Prohibition Law of Indiana, Act of 1918, April 2:

Indiana Law

"Section I. . . . This act shall be deemed an exercise of the police power of the state for the protection of the economic welfare, health, peace and morals of the people of the

state, and all of its provisions shall be liberally construed for the accomplishment of that purpose."

Other State Laws

Section I of the Michigan prohibition law of 1918, May 1, is practically identical with the above, as is Section I of the prohibition law of Oregon, Jan. 1, 1916, and Section I of the South Dakota act of Feb. 21, 1917.

Nuisances

One form of the exercise of the police power is the definition and provisions for the prevention or abatement of nuisances. A statute of Tennessee (Oct. 16, 1913) in Section I, groups the "Conducting, maintaining, carrying on, or engaging in the sale of intoxicating liquors," with the conduct of bawdy houses and gambling houses, as public nuisances, and provides for their abatement.

The Federal Constitution

Very little of the police power was vested in the federal government by the original Constitution—it was nearly all left to the states. The commerce power, to be sure, touches on the police power, as does the Thirteenth Amendment, which prohibits slavery, certain clauses of the Fourteenth, and of course the Eighteenth, which prohibits any form of the liquor business. But the great body of the police power still belongs to the states, and even before the Eighteenth Amendment was adopted all state prohibition, local option and license were based on that power.

For a long time states were reluctant to fasten in their Constitutions a restriction of popular liberty by extending the police power over the liquor business. Statutes were passed and were repealed. But to adopt a change in the Constitution a popular vote was necessary in all the states, and in state after state such amendments were voted down at the election. In 1884, 1887 and 1889 a dozen states in that way rejected prohibition constitutional amendments. With the tide setting that way it was clearly hopeless to attempt to secure a federal prohibitory amendment.

Woolley, 151

But within the last few decades there has been a change in the states. Whether there was a distinct revolution in the

popular conviction, or whether there was a more effective organization of temperance campaigns, is immaterial. The fact is that, as has been seen above, many states adopted statutory or Constitutional prohibition, and many others by the way of local option were largely under prohibition. This situation made easy the reënforcement of war sentiment to secure war time prohibition, and that in turn made it easy to secure the passage by a two-thirds vote in each house of Congress of a joint resolution for amendment of the federal Constitution to the same end.

The Prohibition Amendment in Congress 1917

The joint resolution was introduced in the Senate on the fourth of April, 1917—two days after the address to Congress by President Wilson recommending a declaration of war against the Imperial German government. The proceedings for a declaration of war were rapid and the President's signature made war a fact on April the sixth. The procedure for amending the Constitution was more deliberate—the amending resolution was passed December, 1917.

Evading Responsibility

A curious view was expressed by Senator Sheppard of Texas, who introduced the joint resolution. He said: "Were I opposed on principle to nation wide prohibition, I would vote to submit the amendment to the states in order that they might exercise one of their fundamental rights." In other words he would evade the responsibility in the Senate of acting on conviction and would pass on that responsibility to the state legislatures. No doubt a number of votes in each house were determined in that way—a politician is often inclined when he can to dodge taking a definite stand on a controverted question. Not a few acts of state legislative bodies in like manner embody a referendum clause and are passed rather easily because in that way legislators may shirk making a real record.

Article V

But the Constitution of the United States recites: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution."

One can hardly question that the "necessity" in the mind of the framers related to the substance of proposed amendments and not to the political exigencies of members of the Congress. Change in the organic law is the most important of legislative acts, and should be made with great deliberation and care. The Constitution is constructed to secure such a process of change by the provision of a double check on haste and excitement—the deliberate approval of two-thirds of each house of the Congress, and the deliberate approval of each house of the legislatures of three-fourths of the states, voting in them by simple majorities and not under a two-thirds requirement. Of course if any state should have a unicameral legislature—and no state has—its majority would record the action of the state. But to guard the Constitution there should be no shifting of responsibility by any legislator. The Constitution does not presuppose cowardice.

Compensation for Destruction of Property

The destruction of a business which thus far in some form had been recognized by law implied of course the destruction of certain property values, as was the case with the abolition of slavery. An amendment was proposed in the Senate recognizing this act and providing compensation.

Mugler v. Kansas. Kansas v. Siebold, 123 U. S. 623

To be sure the courts had held that under the police power it was legitimate to destroy property which was held noxious, without compensation—that its destruction was not depriving the owner of it without due process of law. Still the ordinary Anglo-Saxon sense of equity revolted at such methods, and the amendment moved by Senator Stone of Missouri was to the effect that the act for prohibition should not be enforced until the Congress should have made provision for the ascertainment and payment of damages resulting therefrom. It was estimated that in the brewing industry the capital invested was about $750,000,000, distilling, $80,000,000, wine making, $30,000,000, malting, $421,000,000. It might not be easy to make an accurate estimate of the further capital of the retail liquor business.

The Senators were reminded that in 1862 President Lincoln urged the abolition of slavery in the border states with fair compensation. Indeed reckoning the 4,000,000 slaves in all the slave states at an average of $400 each would have made compensated freedom cost $1,600,000,000—far less of course than the vast money cost of the Civil War. President Lincoln's plan failed because of the opposition of the border states themselves.

It was pointed out in reply to the appeal to compensate the owners of intoxicating liquor property that much of that property could be transformed to other uses without material loss.

The amendment was lost—yeas 31, nays 50, not voting 15.

Distilled Liquors

Another amendment offered in the Senate would have limited prohibition to distilled liquors, which the proponents claimed did most of the harm. This amendment was lost—yeas 22, nays 57, not voting 17.

Light Wines and Beer

In the House of Representatives an amendment was moved exempting wines with not more than 14 per cent of alcohol and beer with not more than 3 per cent—in other words light wines and beer—but this also was defeated, by a vote of 107 yea, and 232 nay.

Purchase and Use

The resolution for a constitutional amendment proposed to prohibit the "manufacture, sale or transportation of intoxicating liquors." An amendment to this was offered adding the words "purchase" and "use." Only four Senators voted for this drastic extension of the Constitution—Broussard, Harding, Hardwick and Reed.

The Final Vote in Congress

The final vote in the Senate (Aug. 1—the legislative day of July 31) was 65 to 20, with 11 not voting. The final vote in the House was 282 to 128, with 23 not voting. In each case two-thirds voted for the measure, and so it was passed. Thus a nationwide prohibitory amendment of the Constitution was sent to the states.

Ratification by the legislatures of the several states was

prompt and very general. Thirty-six were needed, and the thirty-sixth, Nebraska, ratified on the 16th day of January, 1919. On the 29th of that month the Department of State of the United States issued a proclamation announcing that the amendment was a part of the Constitution, to take effect, under its terms, on the 16th day of January, 1920. Nine other state legislatures ratified later, only three—Connecticut, New Jersey and Rhode Island—declining to ratify at all.

Ratification by State Legislatures

One may wonder what would have been the fate of ratification had it depended on popular vote instead of on action of the legislatures. At the time of the adoption of the federal amendment seventeen states had Constitutional provisions for prohibitions, fifteen states had statutory provisions to the same effect, and sixteen states were under some form of local option. Of the thirty-two states which had one or the other form of prohibition, twenty-one had taken action to that end since the beginning of the World War in August, 1914. It is well understood that legislative bodies, whether in Washington or in the state capitals, are more easily influenced in various ways than is the electorate. The methods of "pressure" brought to bear on legislators are familiar enough, while the single voter with his secret ballot is quite free to record his actual opinion. It is a common saying that there are members of legislative assemblies who "do not vote as they drink and who do not drink as they vote."

Ratification by Legislatures Perhaps not Real Expression of Popular Will

Anti-Saloon League Year Book, 1919, pp. 41–43

As an illustration, at the general election in 1918 an amendment to the Constitution of Missouri for statewide prohibition was defeated, by a vote of 300,354 to 227,501, while early in the following year the legislature ratified the federal amendment.

The Eighteenth Amendment is not self-enforcing.

Enforcement Statutes

The Thirteenth Amendment prohibits slavery—in other words abolishes the legal status whereby the labor of any individual is made the property of another, and prohibits such legal status for the future. The courts afford a ready de-

fense for anyone who may be held in servitude contrary to law. Obviously the two parties to such a situation—the slave and the slave holder—may usually be presumed to differ radically in opinion—their interests and desires will usually be utterly antagonistic. The enforcement of such a constitutional mandate, therefore, presents few difficulties. It is a guaranty of freedom, with every incentive to seek legal aid on the part of anyone whose freedom is threatened or impaired.

The Eighteenth Amendment, on the contrary, is a limitation of freedom. Both sale and transportation for instance, are forbidden. But in such a transaction it may be taken for granted that both vendor and purchaser equally desire the law to be evaded and the penalty escaped. Neither of the parties, then, unless in case of a spy, can be expected to aid the officers of government. Enforcement, therefore, must be based on a plan radically different from the mere presence and orderly operation of courts of law. The defense of liberty is one thing—and a large part of the federal Constitution is devoted to the protection of liberty. The restriction of liberty is a very different thing. If there is not general acquiescence in the wisdom of such restriction—in time of an emergency like war there is usually very general acquiescense—then there is the problem of enforcement against the will and the judgment possibly of large bodies of people. That is what confronted the British government in the American Colonies, for instance in attempting to collect the duty on tea; but certainly the results did not show marked success. This is what the federal government of the United States tried to do in certain northern states in carrying out the Fugitive Slave Law of 1850—only to be met in Massachusetts and in several other states by personal liberty laws which forbade the use of state facilities for enforcement of the federal law. This is what the federal government attempted in the South as to negro suffrage after the

Fifteenth Amendment was adopted, only to meet with entire failure.

The federal statute for the enforcement of the Eighteenth Amendment became law Oct. 28, 1919, to take effect with the amendment, Jan. 16, 1920, and is extremely drastic. The National Prohibition Act, Effective Jan. 16, 1920

The act was constituted really for a double purpose—to enforce war time prohibition, a wholly temporary measure, and to enforce the constitutional amendment. It was this joining together in one bill the quite diverse matters which led to a veto by President Wilson—a veto which was overruled by a two-thirds vote in each House of Congress—in the House of Representatives on October 27 and in the Senate on October 28. The latter therefore is the date of the act.

The provisions of the law for the enforcement of the amendment begin with a definition of intoxicating liquor.

Of course it is well understood that the prohibitory laws relate only to alcoholic liquors, and the obvious question at the outset is as to what amount of the alcoholic content will make such liquors intoxicating. A little alcohol will intoxicate some persons, some can resist even very large amounts, and there are countless variations between these limits. Is liquor to be regarded as intoxicating within the meaning of the Constitution if it will intoxicate anybody, or only if it will produce that effect on considerable numbers of consumers? Definition of Intoxicating Liquor

If the former interpretation is adopted, then what is the minimum of alcohol which will be effective?

If such minimum can be determined, then how far below that should the law fix the alcoholic permissive maximum?

Or should any alcohol at all be forbidden in beverages?

These were the questions to be answered at the outset in framing the statute.

The bill was framed under the advice doubtless of the organized advocated of prohibition, and was based on almost the extreme view of the nature of intoxicants. The principle

adopted was to permit an alcoholic content in liquor, to be sure, but to put that content at a percentage so low as to make certain that it could intoxicate nobody. One-half of one per cent by volume was the ratio fixed.

Fact or Legal Fiction?

It might easily be that a larger percentage of alcohol would be entirely innocuous. For the sake of discussion it may be assumed that one and one-half per cent should be proved entirely safe. Then at once the question arises whether the margin of one per cent between the ratio of the statute and the assumed ratio of nonintoxicating content was constitutionally within the power of Congress to prohibit. The whole prohibitory power of Congress is based on the Eighteenth Amendment, and that specifies "intoxicating liquor." The one per cent in question is by presumption not intoxicating. Can it be made intoxicating by a fiction of law?

Fiction of Law Judicially Sustained

The statute assumes the affirmative of this question, and the courts have sustained this view of the matter. The District Court of New Jersey in 1920 (Feigenspan v. Bodine, 264 Fed. 186) said: "Is the definition of intoxicating liquor as 'liquor containing one-half of one per cent or more of alcohol by volume which are fit for use for beverage purposes' without basis in fact, and therefore arbitrary and void? It is the presence of alcohol that makes liquor intoxicating. Experts differ in their beliefs and opinions as to what quantity of alcohol will or will not produce intoxication. The effect of the same quantity upon different persons varies, depending upon a number of conditions, and defying exact definitions." The Court pointed out the need of legislative definition, as otherwise definition would be left to the Courts, and conflicting decisions would be sure to follow. Definition, the Court said, is a constitutional right of Congress. "If in the exercise of discretion it determined that the proper enforcement of such prohibition required that a percentage be adopted that would certainly prevent intoxicating liquors being made and bartered, and the adopted basis or percent-

age has a reasonably appreciable relation to the subject matter of the prohibition, it cannot be judicially condemned as arbitrary."

The Supreme Court has sustained this view (ante C. III. pp. 41 sq.) hence, it may be considered settled law that a legal fiction may be adopted by Congress in its definition of intoxicating liquor in order to prevent the transactions forbidden in the amendment.

But of course it also follows that Congress should it see fit may adopt a totally different basis, may settle on a definition which may relate to liquors that in point of fact do cause intoxication when taken to excess by many people. So long as Congress adopts a definition no doubt the Courts will accept it.

Possession of Liquor

The amendment by no means forbids the possession or the use of intoxicating liquors. The act, however, does forbid possession under any circumstances which might make it easy to evade the law. This has been approved by a federal Court (Massey v. U. S., 281 Fed. 293). But the possession of liquor in one's home the Court holds to be entirely lawful—the act permits possession in a private dwelling for the personal use of the owner, his family and his *bona fide* friends (Sec. 33: Street v. Lincoln Safe Deposit Co. (1920), 25 U. S. 88; Rose v. U. S., 274 Fed. 245).

Medical Prescriptions

Physicians are entitled to a permit which authorizes prescriptions of alcoholic intoxicants (Sec. 7). The act puts a limit on such prescriptions—not more than one pint shall be taken internally within ten days, and no prescriptions shall be filled more than once. But this limit has been judicially determined to be unconstitutional.

Sacramental Use of Wine

Wine for sacramental purposes is also permitted, and such permits are held valid by the Courts (U. S. v. Dowling, 278 Fed. 630).

Articles not Prohibited

The act specifies (Sec. 4) articles not included in the prohibited list, all of which must be unfit for use as beverages—

medical preparations, patent medicines, flavoring extracts, vinegar and preserved sweet cider.

Provision for Enforcement

The Commissioner of Internal Revenue and the Attorney General of the United States are authorized (Sec. 38) to appoint and employ assistants to enforce the act, and a liberal appropriation was made for these purposes ($2,000,000 for the Commissioner and $100,000 for the Attorney General).

New Police Power or Congress

It will be seen at once that this act so far as intoxicating liquors are concerned is an exercise by Congress of police power which before the adoption of the amendment was reserved to the states (U. S. v. Cohen, 268 Fed. 420), and this power now may be used not merely for interstate transportation as under the commerce clause in the Constitution but applies now directly to intrastate transportation of liquors (Street v. Lincoln Safe Deposit Co., 267 Fed. 706).

Double Jeopardy

A curious situation results from the fact that besides the National Prohibition Act there may be in each state, as in fact there are in most states, also state prohibition laws, and of course a single act may be a violation of each of the two laws. It follows that under certain circumstances an accused person may be subject to two trials and two convictions for the same offense—in other words he is subject to double jeopardy. It has been held that conviction under the federal act is a bar to prosecution under state law (State v. Smith, 101 Or. 127), but that conviction in a state Court is no bar to prosecution in a federal Court (U. S. v. McCann, 281 Fed. 880). This last decision of a federal district Court in Connecticut has been upheld by the Supreme Court of the United States.

The possibility of such double penalty is intolerable. It may well be that prosecuting officers withhold action under circumstances so obviously unjust. Still the law should not permit circumstances of that character. Justice should be founded on law and not on the caprice, however well intentioned, of any individual.

The question apparently unforseen by Congress was the application of the new body of law to sea-going ships—to foreign vessels entering American waters, and to American ships on the high seas and in foreign ports. Foreign ships came into our ports with their accustomed allowances of wines and liquors and for some time they were unmolested. The craft of the United States Shipping Board also at first served intoxicating liquors after leaving their home ports, such service being considered necessary in order to compete with foreign lines.

Three Mile Limit and The High Seas

A ruling of the Attorney General made the National Prohibition Law apply in both cases, however, and suit was brought so as to secure judicial determination. The case reached the Supreme Court and the decision was rendered the last day of April, 1923—more than three years after the law went into effect.

262 U. S. 100

Suit was brought by certain foreign lines against the Secretary of the Treasury and by two American lines against the Collector of the Port of New York, to prevent the enforcement of the laws as above noted and appeal was taken at once to the Supreme Court.

The Court points out that the Eighteenth Amendment prohibits the manufacture, sale, transportation, importation into and exportation from the United States and all territory subject to the jurisdiction thereof, for beverage purposes.

It is then held that the area covered by the legislation includes all the land of the United States, with the indenting bays, gulfs, ports, harbors and other indenting arms of the sea along its coast, "and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles." Liquors in transit through the Panama Canal or over Panama by railroad are an express exception.

The acts prohibited by the amendment and by the enforcement act are all such acts committed within that area.

Foreign merchant vessels voluntarily entering American waters become subject to American jurisdiction.

Such vessels are not a part of the territory of their own states—it is a mere figure of speech to hold them floating territory.

It has been customary to exempt the internal affairs of vessels in foreign waters from the local jurisdiction so far as the peace and tranquillity of the port are not infringed. But such exemption is a matter of comity only, and not of international law.

The law therefore applies to any foreign vessels entering an American port with intoxicating liquors on board, whether as cargo or as ship's stores, even if such stores are sealed and disused in American waters.

The law is strictly territorial in its application and therefore does not apply to all American ships outside the three mile limit. No doubt Congress could act to place the prohibition on American vessels wherever they may be, but they are not governed by the Eighteenth Amendment or by the enforcement law. The act has been amended to cover American vessels outside the three mile limit, and treaties with certain foreign powers permit search and seizure as far as twelve miles from the shore.

The Ample Legal Status of Prohibition

Thus national prohibition is embodied in the federal Constitution, is reënforced by a drastic enforcement law, is provided with ample funds and machinery for putting the law into action, and is buttressed by the decisions of the highest Court. It would seem that there should be no material difficulty in making the vision of the radical prohibition advocates a reality.

The Difficulties of Enforcement

As yet, however, there is no such reality, and from the nature of the case it is peculiarly difficult to create it.

There are certain criteria which always mark a condition of affairs which make it not easy to enforce legislation.

One is a situation in which a considerable number of people

regard the law as unjust. This is especially true when many of these people are usually and by nature and education inclined to be law-abiding. But even if they yield obedience to the law in question they resent being obliged to obey what they consider inequitable.

Another situation, sometimes resulting from the first, is that in which a considerable number of people do not regard it as wrong to evade the law.

The philosophers distinguish matters forbidden by law as *mala in se* and *mala prohibita*—those which the general mass of mankind regard as evil in themselves, and those which are not so regarded but yet come under the interdiction of law. If a large body of people consider a law as in the second class, there is not the same impelling motive for obedience.

Another situation is that in which it is rather easy to evade the legal mandate. Legislation under such circumstances is especially difficult to enforce.

National prohibition is in fact subject to all three of these adverse conditions.

There are large bodies of people, doubtless a majority in some communities, who hold the amendment, and especially the enforcement act, as opposed to natural equity. They regard these measures as an indefensible trenching on the liberty of the individual—as an extraordinary perversion of the Constitution from a protection of liberty to a limitation of liberty. This seems to be true especially in the great centers of population.

There are considerable bodies of people, probably not so many as those above noted, who regard it as morally right to disobey an unjust law.

The fact is that the history of our republic has many instances of this kind, and successive generations have been trained to lawlessness under certain conditions.

The taxing acts of the British parliament—disobedience to which was certainly in the class of *mala prohibita*—were flatly

disobeyed. The nullification policy of South Carolina was exactly of this kind, and while President Jackson, if the matter had come to a test, very likely would have used force, yet in the end Congress preferred to settle the question by compromise.

The Fugitive Slave Law of 1850 was exactly a case in point. Many people in the free states considered the law as flagrantly unjust, and held themselves fully warranted in disregarding it. They did disregard it—not merely in individual cases, but by formal acts of free state legislatures (personal liberty laws). Moreover many of the leaders in what the Southerners regarded as little short of rebellion were themselves men of the highest moral character and reputation. They believed that they were heeding what they distinctly announced as a "higher law."

National prohibition also is not very difficult to evade. The frontiers of the republic extend thousands of miles—the sea coasts themselves are measured in thousands, great cargoes of liquors, for instance, come to the Bahama Islands and thence find their way to innumerable points of landing. If now and then a consignment is taken, even then the profits are so large that such loss can be disregarded.

Special Difficulties

But there are some special reasons for prosperous evasions of these particular acts of legislation.

There are many who resent the way in which the amendment was forced through Congress when the American armies —millions of voters—were over seas. There are also many who resent the tactics by which legislatures were driven to ratify without regard to the popular will. A correspondent of a great New York paper, under date of June 10, 1923, says:

Constitution of Tennessee, Art. II, Sec. 32

"The Constitution of Tennessee provides that any change in the organic law must be submitted to a popular vote. The night before the day on which the legislature was to vote on this measure both chambers of the capitol were taken posses-

sion of by a crowd of women and ministers, who sang, prayed, and abused in the most insulting manner—while the vote was being taken—those who presumed to vote against ratification. Only a bare quorum voted for the measure, the actual majority apparently being afraid to vote their honest sentiments.

"In Alabama submission to popular vote was also enjoined by the state Constitution, but Speaker ——— said the people did not have sense enough to vote on this proposition, and it was jammed through regardless of popular approval.

"Texas voted 38,000 in opposition to the amendment, yet the legislature, influenced by the methods used in Tennessee and elsewhere, promptly ratified it."

Whatever be the detailed facts in these cases, and whatever the constitutional questions involved, there is a widespread opinion that such methods were used by the organized temperance forces, and that a measure so profoundly affecting the customs and the settled opinions of large masses of people was railroaded through legislative bodies with slight regard to the real will of the people. At any rate it is well known that if anyone ventures to express an opinion adverse to any of the measures or methods of the prohibition propaganda, he is at once made a target for a flood of personal abuse. Such methods are setting people to thinking.

Foreign Vessels Within the Three Mile Zone

Of course the application of the law to foreign vessels in American waters raises serious international questions. It is hard to see how the reasoning of the Supreme Court in the cases last cited can be gainsaid. It is also obvious that the immediate result is a gross violation of international comity. In 1886 the Supreme Court said:

"By comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her and did not involve the peace or dignity of the

120 U. S. 1

country or the tranquillity of the port should be by the government left to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require."

Naturally a nation may lawfully decline to extend the usual comity to visitors in its waters; but quite aside from the possibility of retaliation the government of a civilized nation is reluctant to refrain from the usual courtesies which mark modern international relations. However a temporary modus vivendi may be found if the laws of a foreign state require wine rations; for instance, the wine stores may be regarded as part of the medicinal equipment.

Whether it is in the power of Congress to permit ordinary liquor rations, even under seal, to be held by foreign ships in American waters, at least under the definition of intoxicants in the prohibition act, is not open to serious question.

The main difficulty in preventing the importation of intoxicating liquors, at least on the Atlantic Coast, seems to relate to British vessels. They lie outside the three mile line and send in their cargoes when practicable.

Treaty Between the United States and Great Britain, 1924

To meet this difficulty and at the same time to obviate the requirement that foreign vessels shall not have wines or liquors on board, even if kept under seal and for use outside American waters, a treaty has been made between Great Britain and the United States which makes mutual concessions. Great Britain consents to search and seizure of vessels under the British flag outside the three mile zone—to search if there is reasonable ground for belief that the vessel is intended to violate the laws of the United States by the importation of intoxicating beverages, seizure if such belief proves well founded. The limit of waters in which immunity of search on the high seas is waived is one hour's steaming from the coast. On the other hand the United States consents that British vessels may keep alcoholic liquors in American

waters provided they are kept under seal so long as the vessel is in American jurisdiction.

It seems quite likely that similar treaties may be negotiated with other nations.

That this treaty solves the difficulty so far as the National Prohibition Act is concerned, there can be no doubt. A treaty, if later in time, supersedes an act of Congress. Whether the treaty violates the Eighteenth Amendment may have to reach the Supreme Court for decision. Eminent authorities hold that there is no violation of common sense.

Failure of Control

It has been seen that government implies control, and it is fairly evident that measures may be adopted by legislative bodies which are peculiarly difficult of enforcement. In other words there are conditions under which control may become practically futile. To this extent government becomes a nullity.

The Foreign Slave Trade and Liquor Importations

There is an analogy between the working of the statutes for the prevention of the importation of slaves into the United States and the statute in like manner forbidding the importation of intoxicating liquors. In both cases there are concerned numbers of people who regard the statutes as oppressive and unethical. In both cases there are traders who have found profit in illicit importation. In both cases there are traders within the country who have found profit in purchasing the illicit commodities. In both cases these traders find abundant customers. The strong impetus of large profits combined with wide disapproval of the law in certain sections, has made each of the inhibitory laws to say the least extremely difficult to enforce.

Federal Police Power Increased

In any event the Prohibition Amendment has greatly increased the police power of the federal government.

It has to the same extent lessened state power. It has necessitated further federal official organization, further federal interference with state affairs, further uniformity of central control over local social life. The variety of state

policies possible, and often desirable, in the federal system, is again crushed to a dead level under centralized law.

Obedience to law

Resumé

Surely there is no need to say that the first duty of every citizen is to obey the laws of his country—all its laws. Of this there is no dispute. Of course there are criminals in every society. There are some others who at times may be led to evade restraints which interfere with their pleasure or their profit. Still, in all highly civilized states respect for the laws of the land is matter of ordinary custom. When newcomers in numbers are found to be lawless, or when a considerable body of old citizens are regardless of their duty to the state, there is reason for grave alarm.

There are circumstances, however, under which scrupulous and high minded members of the community feel warranted in disobeying certain laws which they hold not binding on them. Such, for instance, are those who hold a given law as conflicting with a higher moral law—the laws of God they consider of higher validity than laws of human enactment. In the days preceding the war of secession there were many conscientious abolitionists who held the fugitive slave law to be in conflict with divine law. With them conscience was above patriotism—or rather they believed that they had a higher patriotism. Usually too a Quaker will cheerfully go to prison rather than serve in the army. Such consciences may be inconvenient for governments, but at least they are respectable.

Then also a citizen may consider himself justified in disregarding a law which he believes to be inimical to the security of his property, or the safety of his person or that of his family. Many good citizens of the former slave states took this view of the laws respecting to negro political rights. Lawless organizations and their violent acts were held warranted on the ground of self-defense. There are at times tax laws which seem to be little better than confiscatory, and very respectable people are occasionally oblivious of customs duties.

In acting contrary to law under conviction of duty or of safety citizens must of course be prepared to face the consequences. Law is supreme and if it is enforced penalty must follow. But there are times when penalty fails—is impossible.

None of these considerations apply to the national prohibition law. Obedience to this law can violate no conscience, can endanger no personal safety. One may hold that what the law forbids is in itself neither immoral nor noxious—that the statutes are tyrannical interferences with a sphere of personal liberty which should be inviolate. But the law does not command one to do something which he considers to be wrong—it forbids him to do something which he regards as harmless—there is no immorality in refraining in obedience to law.

Even so, there are large bodies of people who take this negative view of the law—they feel aggrieved at a needless restraint of personal liberty—and therefore they are in many cases inclined to disregard the law. Were such people rather uniformly distributed throughout the republic there would be little difficulty. But they are few in some states, are probably a decisive majority in others. It is here that a federal law finds its weakness. Were the states free to act uncompelled many would doubtless adopt prohibition laws at once—others would not, and in these the progress of the reform would be perhaps slow. But the possibility of variety would be in accordance with the best doctrines of political science—law would come from below, from the overwhelming mass of those on whom its inhibition lies—it would not be imposed from above.

The presumption should always be for local liberty—for the rights of the states. Only imperative necessity made us federate. Only overwhelming importance should warrant adding to federal power.

CHAPTER VI

AMENDMENTS TO THE FEDERAL CONSTITUTION PROPOSED IN THE 68TH CONGRESS. MANY ATTACKS ON THE FEDERAL EQUILIBRIUM

In the first Session of the 68th Congress there were introduced 98 joint resolutions for amendment of the federal Constitution—77 in the House of Representatives and 21 in the Senate. Many of these covered the same subject, and many repeated joint resolutions of the preceding Congress—as indeed not a few had been introduced year after year in successive Congresses.

Of these 98 only one secured in the first Session a two-thirds vote in each House and hence has been proposed to the states. This would vest in the Congress control of child labor legislation.

While therefore nearly all of the joint resolutions in question do not get beyond the Committee stage and probably never will be proposed for state action, at the same time they are of interest in showing what sort of measures relating to the organic law appeal to certain elements of our people. It is also perhaps worth examining to see whether there is a thoughtful study of the history and bearing of the Constitution as it is before attempting to modify it, or whether suggested modifications in sundry cases come from notions irrelevant to the principles of the Constitution itself. Let us therefore give attention to all the 98 joint resolutions as if they had a serious bearing on actuality.

Perhaps these propositions of amendment may be grouped conveniently under five heads:

I. Those relating to the process of amending the Constitution; II. Those relating to citizenship and suffrage; III. Such as deal with the structure of the federal government and the relative powers of the different branches of the same; IV. Those proposing a limitation on the powers of the federal government; V. Those proposing an increase in the powers of the federal government.

I

PLANS FOR CHANGING THE METHOD OF AMENDING THE FEDERAL CONSTITUTION

The Constitution, Art. V.

The fifth article of the Constitution embodies the method by which the organic law may be amended.

The Constitution was made law by action of the states, and it is only by action of the states that it can be amended.

The Method and its Infelicities

Amendments may be drafted and submitted to the states for action either by the Congress or by a Convention—and in no other way.

It is the duty of the Congress to provide for a Constitutional Convention if application is made by the legislatures of two-thirds of the states. There has as yet been no such application.

All proposals of amendment thus far have come from the Congress.

The Congress may propose amendments only "whenever two-thirds of both Houses shall deem it necessary." No proposal of amendment, therefore, can go to the states unless ordered by a two-thirds vote in each House of the Congress. The fact of such vote is held to imply that the Houses both "deem necessary" the proposal submitted—although exactly what is meant by necessity is perhaps not clearly indicated. The necessity in the judgment of the Congress

may consist in the importance of the change in question as an improvement of the Constitution, or it may consist in the desirability of winning support for members at the elections by adopting a popular measure. The necessity, or perhaps we may say the desirability, of a certain change, accordingly is a matter of opinion, and is left to the discretion of the two houses of the Congress. The two-thirds vote is a mandatory condition precedent to submitting a proposed amendment to the states.

National Prohibition Cases, 253 U. S. 386 Supra, p. 41 sq.

An amendment being duly proposed, it can be enacted into law as a part of the Constitution only by action of the states —and the states can act to that end only in a manner which the Constitution specifies. The requirements are two. Three-fourths of the entire number of states are required in order to make valid the enactment, and the states can act only through their legislatures.

Infelicities in Art. V.

The experience now of a hundred and thirty-six years under the Constitution, involving the adoption of Nineteen Amendments, has shown plainly that the processes of Article V, in its provisions both for the proposition and for the enactment of amendments, is open to some serious uncertainties and difficulties. Some of these apparently have been settled by a series of precedents, but others still remain open to doubt.

I. Proposals of Amendment

Thus far, as has been said, amendments have been uniformly submitted to the state legislatures in joint resolutions adopted by the two Houses of the Congress by a two-thirds vote. Sporadic suggestions for a federal Constitutional Convention have been made from time to time—by Georgia and Alabama in 1832, also just before the Civil War by seven of the thirty-six states.

A Federal Convention

Ames, p. 345, 383

But a federal Convention really implies some radical reconstruction of the Constitution, and the changes widely deemed desirable never so far have gone to that extent.

"The Congress, whenever two-thirds of both Houses shall

deem it necessary, shall propose Amendments to this Constitution," recites Article V.

The Two-thirds Vote in Congress

"Two-thirds of both Houses"—does that mean two-thirds of the total membership of each House, or two-thirds of those present when a vote is taken, a quorum being present?

The Two Hypotheses

The number of senators from the 48 states at the present time is 96. A quorum is 49. Therefore under the first hypothesis a two-thirds vote of the Senate would be 72—under the second hypothesis a two-thirds vote might be 33.

Ante, p. 42

The number of representatives in the 68th Congress is 435. A quorum of this number is 218. Therefore under the first hypothesis a two-thirds vote of the House would be 290—under the second hypothesis a two-thirds vote might be 145.

This question seems first to have been raised in the discussion on the joint resolution proposing the Twelfth Amendment. It was urged by the Federalists, who opposed that Amendment, that the first hypothesis was the only one tenable. It was pointed out in reply that some of the most important of the first ten amendments were recommended by votes of the two Houses under the second hypothesis.

Ames, p. 295

The question was raised again in the Senate in 1861, when the chair ruled in favor of the second hypothesis. A similar ruling on the two-thirds required to pass a bill over the President's disapproval was made in the Senate in 1856.

Sen. Journal 34th Cong. 1 and 2 Sess. 419

The question was raised again before the Supreme Court in the argument on the National Prohibition cases. The conclusion of the Court on this point was to this effect: "The two-thirds vote in each House which is required in proposing an amendment is a vote of two-thirds of the members present —assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent."

Decision of the Supreme Court, 253 U. S. 386

The question therefore seems no longer open to discussion. If the other hypothesis is to be established as the law of the Constitution, it can be only by the amendment of Art. V.

It would seem that the principle should rest on explicit en-

actment in the Constitution, rather than on precedent and judicial interpretation. It would also seem that so vital a matter as an alteration or addition to the organic law should not be at the possible discretion of less than one-third of the whole number of senators (29, which is two-thirds of a quorum, but less than one-third of the 96 Senators). Nor should it rest on the possible discretion of one-third the whole numbers of members of the House (145, two-thirds of a bare quorum, but only one-third the total membership).

Executive Approval

The Constitution (Art. I, Sec. 7, § 3) subjects to the approval of the President "Every order, Resolution or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment)." It is difficult to see why this should not apply to a joint resolution proposing an amendment to the Constitution. It may be said that as an action of the two Houses may be passed over the President's disapproval by a two-thirds vote of each House, and that as such a joint resolution has already had such vote, therefore the intervention of the Executive is needless. Two considerations would seem to be conclusive in answer to this proposition. In the first place the vote by which an amendment may be proposed in either House, while two-thirds of the number of members present at the time the vote was taken, might not be two-thirds of those present later on the question of passage over the disapproval of the President. In the second place the reasons actuating the executive on disapproval might easily induce some members to change their vote—such cases have not been unknown.

Hollingsworth v. Virginia, 3 Dallas 378

However, an opposite view has been held in practice. The Supreme Court, in a case relating to the Eleventh Amendment unanimously held that an amendment need not be submitted to the President. This adjudication has been maintained by Congress—in 1803 in the Senate, on a motion that a pending amendment should be submitted to the President,

the motion being defeated, yeas 7, nays 23; and again in the Senate in 1865. It seems that the proposed amendment abolishing slavery—later ratified as the Thirteenth—was inadvertently sent to the President and was returned with his approval. A resolution was at once adopted holding that Executive approval was needless on such a question and reciting that the then action of the President should not be held as a precedent. The debate was interesting—it is well summarized by Jameson (§§ 556–560).

It was urged that the approval of the President is concerned only with legislation—that the part of Congress in amending the Constitution has in itself no force as creating law—that Congress merely proposes, and that it is the states which enact—and that therefore the President should have no voice in the matter.

Still, the states enact, so far as the process of amendment is concerned, only on the proposal of Congress—Congress formulates the project of amendment and proposes it—does not merely submit it—to the states—the states could not act unless the action of Congress had preceded—it would seem, therefore, that the Congress is an essential element in this process of organic legislation and if so it would seem to come under the requirement of Article I.

At all events the elimination of the President from the process is accomplished by interpretation of the Constitution, not by its specific mandate. So important a construction of Article V in its relation to Article I might better be made definite in the text itself.

II. Ratification by State Legislatures

The same inference has been applied to the share of state Legislatures in ratification—it has been held that the state Executive has no share in it. This is perhaps still more significant, as a two-thirds vote in each House of the Legislature is not required—but the minimum is a bare majority of a majority—a majority of those present, a quorum being assumed.

An amendment proposed by Congress becomes a part of the Constitution when ratified "by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof," as Congress may determine. Ratification by Conventions has never been proposed by the Congress.

The question of what vote shall be required in order to constitute a vote of a Legislature is not raised in the provisions of Article V. The vote of a Legislature, unless otherwise specified, may fairly be taken as determined by a majority of those present in each House, presuming the presence of a quorum.

Some other questions, however, may arise in connection with legislative action.

Some Other Questions

1. May the Congress prescribe the procedure under which the state Legislature must act?

2. May the Congress prescribe a date after which state legislative action is invalid?

3. May the Congress or a state Legislature, having approved a joint resolution for amendment, afterwards reconsider and rescind its action?

Nearly all these questions have at one time or another had consideration and have been settled by a series of precedents of Congressional action and by Supreme Court decisions.

Congress and the State Legislatures

1. As to the first of these questions, it at once appears that Art. V, gives the Congress no power to control the actions of the state Legislatures, and it is difficult to see how any such power can be inferred from an act of recommendation. In proposing an amendment to the states it would seem that Congress has exhausted its powers on that subject. The next step relates to approval or disapproval by state Legislatures, and Congress has in the Constitution no power to control the structure or procedure of these bodies—such matters belong wholly to the reserved powers of the states.

2. Some curious questions arise in connection with pro-

posed amendments which have not been ratified by the Legislatures of three-fourths of the states.

Amendments Floating in the Air

The second of the twelve amendments proposed by the Congress in 1789 was certainly a salutary one—"No law varying the compensation of members of Congress shall take effect until an election for representatives shall have intervened." This amendment was approved by the Legislatures of Maryland, North Carolina, South Carolina, Delaware, Vermont and Virginia. It was disapproved by the Legislatures of New Jersey, New Hampshire, Pennsylvania, New York and Rhode Island. Apparently the Legislatures of Massachusetts, Connecticut and Georgia took no action. At any rate at that time ten states were required to ratify, and the matter seems then to have been dropped.

Ames, 291, 317

In 1873 the Congress passed an act increasing the compensation of members, and making it retroactive so as to include its own membership, whose term was just expiring. This was exactly the proceeding which was contemplated by the proposed amendment of 1789. Whether the act of 1873 was equitable, or in accord with past precedents,* was wholly immaterial in the public mind of that year—there was general indignation at what was stigmatized as a "Salary grab." The Senate of the State of Ohio adopted a joint resolution ratifying the above amendment of 1789. There were then (1873) 38 states. Had the legislatures of 24 states, other than the five which had originally ratified, adopted this action, we should have had exactly the situation to which our question relates.

Jameson, p. 635

If such proposed amendments are indefinitely subject to ratification, as Jameson points out "There are now floating about us, as it were *in nubibus*, several amendments to the Constitution, which have received the ratification of one or more states, but not enough to make them valid as part of

* The 68th Congress adopted exactly the same action (Act of March 4, 1925).

that instrument. Congress could not withdraw them, and there is in force in regard to them no recognized statute of limitation. Unless abrogated by amendments subsequently adopted, they are, in the hypothesis stated, still before the American people to be adopted or rejected." Judge Jameson also says: "It is therefore possible, though hardly probable, that an amendment, once proposed, is always open to adoption by the nonacting or nonratifying states." He adds that such amendments "ought to be regarded as waived, and not again to be voted upon unless a second time proposed by Congress."

Jameson, 635–6

This no doubt represents what is desirable, but by no means presents the real legal situation. It is not easy to see why such amendments are not actually pending; nor is it easy to see that Congress has any power to enact a statute of limitations for these amendments or for any amendment. The provisions of Art. V might well have added to them such rule of limitation in some form.

Reconsideration of State Action

Ames, 294, Jameson, 631–3

3. Several states, having acted affirmatively on a proposed constitutional amendment, but at a later time, and before three-fourths of the states had approved, by formal legislative act have withdrawn their assent—New Jersey and Ohio in relation to the Fourteenth Amendment and New York in relation to the Fifteenth. In the case of the Fourteenth Amendment Congress passed a concurrent resolution declaring the ratification adequate.

Thus Congress formally put itself on record as holding that when a state has once ratified a proposition of amendment it has exhausted its power on the matter in hand and can take no further action relating to it, and the Secretary of State in announcing the ratification by three-fourths of the states accepted the view of Congress as conclusive.

Whether this interpretation of Article V is correct of course may be open to question. A subsequent Congress, opposed to the ratification of some amendment proposed by a preced-

ing Congress, might record the opposite view. Such an interpretation, therefore, resting on precedent and on the passing opinion of a changing body, it would seem should be fixed one way or another by the Constitution itself. Article V might well be made clear by amendment to this end.

That a state may not rescind its ratification after three-fourths of the states have ratified seems obvious enough. When three-fourths have ratified, the amendment automatically becomes a part of the Constitution, which can hardly be changed by the action of a single state.

A Legislature may vote against ratification and later reconsider its action and ratify—this has been done. The question is open to a state until it ratifies, and a refusal to ratify by a given Legislature merely indicates that that state has so far *not* ratified.

Suggested Amendments to Article V 68th Congress

The process of amendment, then, as set forth in Article V of the Constitution, has been found open to material difficulties of interpretation. In many successive Congresses projects of amendment of the process have been introduced, but so far no one of them has secured a two-thirds vote in each House of the Congress. In the first session of the 68th Congress there were nine such joint resolutions, four in the Senate and five in the House.

Relating to Action of the Congress

How far would any of these plans, should they secure favorable consideration, tend to remedy any of the proved uncertainties, and how far do they propose quite new methods, perhaps in turn to be open to questions of doubt in their interpretation? Do any of them seek to make the process easier than it is now?

Of the 9 joint resolutions introduced in the 68th Congress for amending Article V, only two touch the procedure of proposing amendments.

One (H. J. Res. 246) merely adds to the present system the power of the Congress, by a majority vote of each House, to call a Constitutional Convention.

The other (S. J. Res. 27) would permit an amendment to be submitted to the states by a majority vote of the members enrolled in each House, or by either House should the other House twice reject the proposal. It is also proposed in this scheme that Congress may propose amendments, or may call a Constitutional Convention on request of a majority of the state Legislatures, and that Congress or either House may submit competing measures.

Political Party Amendments

Of course these plans would make any proposition of amendment merely a political party matter—any party at any time having a majority in either House of the Congress could submit propositions of amendment at will. The present two-thirds vote requirement was doubtless intended, and certainly operates, quite generally to take constitutional change out of the field of partisan politics. The Civil War amendments were adopted at a time of quite exceptional conditions. One can imagine the flood of amendments which would inundate the states should such an amendment as this be adopted.

Ratification by the States

All but one of the nine plans introduced in the 68th Congress deal with the mode of ratification by the states—having to do with the mode of voting, in some cases with the possibility of changing the state vote under certain conditions, and with a limit for the date of ratification, thus cutting off the likelihood of there being amendments "floating in the clouds" indefinitely.

Six of the plans call for state ratification by popular vote in place of a vote by the legislature. One (S. J. Res. 109) would permit each state to decide for itself whether to ratify by a direct popular vote or by a convention, the latter of course constituted by popular election; another (H. J. Res. 34) would give the option between ratification by popular vote or by conventions to the Congress.

One (H. J. Res. 68) while leaving ratification to either the legislature or a convention, would require the election of at

least one House of the former body after the submission of a proposed amendment before legislative action could be taken—and would permit any state to require confirmation of the action of the legislature by popular vote.

Three of the plans would permit a state to change its vote at any time prior to actual enactment by three-fourths of the states—or prior to actual rejection by one-fourth of the states.

One (H. J. Res. 34) would have the Congress fix a day for a popular referendum in all the states on a proposed amendment, and that referendum would settle the matter once for all.

There can be no valid objection to a state's passing on the question of ratifying a proposed amendment to the federal Constitution by popular vote; but there is also no valid reason for *requiring* such a method of state action. Each state should decide for itself its own method of ratification—by popular vote, by a convention, or by the legislature. All that should concern the Union is that each state has actually acted one way or the other—that a time has been fixed after which no state can change its action—and that either the same time or a later date be fixed after which, if the proposed amendment is not already enacted, no further action of the states should have any effect.

The Most Desirable Plan of Amending Art. V.

Perhaps the various infelicities in the present process of amendment are most nearly met, and with preservation of the fundamental principle that it is the states which enact constitutional change, in Senate Joint Resolution No. 109, introduced March 28, 1924. This provides for ratification by three-fourths of the states under the following conditions:

1. Ratification in each state may be either by a convention or by a popular vote.

2. Each state decides for itself which method it will follow, and authenticates its own action.

3. Any state may change its vote, either for or against the

amendment proposed, until either three-fourths of the states have ratified or more than one-fourth have rejected.

4. If at any time more than one-fourth of the states have rejected, such rejection is final.

5. Unless ratification is effected within an eight year period from the date of submission, the proposition becomes null and void.

Contrast this with, for instance, one of the above (S. J. Res. 27) which requires a popular vote in the states, fixes the qualification of voters, furnishes voters with literature on the subject, pays all expenses of the election from the United States Treasury, and provides a double majority for ratification—a majority of all votes cast through the Union and a majority of the Congressional districts. The states by this plan disappear from enactment altogether—a complete revolution would be made in the nature of the republic—it would cease to be federal. The one method carefully preserves the states as organic members of the Union—the other destroys them.

Some Comments on the Foregoing Plans of Amendment

The joint resolutions introduced in the 68th Congress for amending Article V give no direct indication of the attitude of that body towards the process of amendment, as no one of the plans has been adopted. Indirectly we may infer, as none of them *was* adopted, that both Houses were content with the process as it stands, with its precedents and its interpretation by the Supreme Court.

The Essence of the Constitution—Federal

The formation, adoption and amendment of the organic law is the supreme expression of sovereignty. In the Constitution of the United States as it is, the vital principle is the nature of the government as that of a federal, and not of a consolidated, republic. It was enacted originally by the unanimous act of all the states which made up the federation, and as each new state applied for admission it thereby gave its adhesion to the Constitution in its entirety. The Constitution, then, as has been said, the Constitution to which each

of the forty-eight states has definitely adhered, is that of a system of government in which supreme power is vested in the states collectively, and is to be exercised by them not by unanimous act, as was the agreement in the old Articles of Confederation; nor by each state individually, as was maintained in the doctrines of nullification and secession; but by three-fourths of the whole number.

No one of the original thirteen states was under any legal obligations to come into the new Union. No one of the thirty-five states which have been admitted since was under any obligation of any kind to seek membership in that Union. But having accepted membership all are obligated to yield to such constitutional change as may be ordained by three-fourths of the members—and to no other.

Yet while this is quite true, it is also true that by this amending process to alter the essential nature of the organic law—the federal system—which come into being by unanimous consent of all the states, unless indeed all the states should consent to the change, would be a proceeding legal in form, but wholly in violation of equity.

Methods of State Action

When the Convention of 1787 recommended state action on proposed amendments by legislatures or by conventions, and when the Constitution containing those methods was accepted by the states, there was no demur on that ground. No other methods of state action were known. If states today prefer a direct popular vote on constitutional questions, there is no reason in the nature of the Constitution for objecting. All that the essence of the Constitution requires is that the states as states shall act in the premises—and states can act by their legislative bodies, by specially chosen conventions, or by direct popular vote. Senators, representing the states, were chosen until quite lately by the Legislatures. Now they are chosen by popular vote. In either case they are designated by the states.

Presidential electors are appointed by the states. Many of

the states long made the appointment by their legislatures—South Carolina until after the Civil War. They are now appointed in each state by popular vote. But they are appointed by the states.

If a majority of the presidential electors do not vote for any one person, then, from the highest three who have electoral votes cast for them, the House of Representatives chooses—but the vote of the House is cast by states, each state having one vote. In other words the Representatives *ad hoc*, become state presidential electors.

Thus it is clear that under the Constitution states may act either by direct vote of its people who under the laws are entrusted with suffrage, or by representative bodies themselves chosen by the voters.

Popular Vote on Federal Amendments

There would, then, be no alteration in the essential nature of the Constitution were Article V amended so as to authorize states to decide questions of ratification or rejection of federal Constitutional amendment by popular vote. In fact, it would be thoroughly in accordance with the spirit of the Constitution if the whole matter of the mode of state action on such questions were left to the states to determine individually. There is no especial virtue in uniformity.

A Consolidated Republic

When it comes, however, to such provisions as are made in one or two of the suggested amendments, to the effect that amendment shall be determined by popular vote in mass throughout the nation, as has been said we have a very different situation. The federal nature of the republic is destroyed. The supreme power is vested, no longer in the states, speaking by a specified proportion of their number, but in the whole mass of people throughout the Union, without regard to state lines. In essence, the United States would no longer be *united* States. The republic would be a consolidated state, its federal nature in some respects remaining in form perhaps, but not in fact.

No doubt there are those who would prefer such a system

of government. To the writer it appears to be a very bad system. What is urged here is the vital difference in the two systems which would be made were such an amendment adopted.

It would seem advisable, in the interest of clarity, to embody in the organic law the interpretations of Article V which from time to time experience has been shown to warrant—there would then be no ground for differences on such questions.

II

CITIZENSHIP AND SUFFRAGE

Prior to the adoption of the Fourteenth Amendment citizenship and suffrage depended wholly on state law. All citizens of states were *ipso facto* citizens of the United States. The Fourteenth Amendment makes "All persons born or naturalized in the United States and subject to the jurisdiction thereof, citizens of the United States and of the state wherein they reside."

A Double Citizenship

The Fifteenth and Nineteenth Amendments, both negative in character, forbid any legal limitation of suffrage on the ground of race, color, or sex.

The Supreme Court has held (Slaughter House Cases, 16 Wallace 36) that there is, therefore, a double citizenship, that of the United States and that of a state, each with its own privileges and immunities.

All citizens of the United States are citizens of the state of residence, and no state may deprive them by law of any federal privileges or immunities. The Congress is not forbidden to legislate to deprive state citizens as such of state privileges or immunities. Nor are the states forbidden to create state citizens who are not federal citizens. This last has virtually been done by some states which grant suffrage and other privileges to aliens who have merely declared their intention

to become citizens of the United States, and have a certain length of residence.

Two joint resolutions in the 68th Congress relate to these subjects. One (H. J. Res. 17) provides that "No child hereafter born in the United States of foreign parentage shall be eligible to citizenship in the United States unless both parents are eligible." The other (H. J. Res. 12) is to the same purport.

This would be a limitation on the sweeping terms of Article XIV of the amendments, and obviously relates to persons who under acts of Congress may not be naturalized.

This would be logical enough, especially in the light of the recent legislation relating to immigration. Perhaps it would hardly be necessary, however, if hereafter aliens ineligible to become citizens are not to be allowed to enter the United States.

The District of Columbia

Two plans (H. J. Res. 15 and 84) give Congress power to provide representation of the District of Columbia in Congress and in the electoral colleges.

This is a peculiarly undesirable provision. The District of Columbia was set aside and made the seat of the federal government for the sole purpose of providing that government with entire exemption from state jurisdiction. The example of European governments and unfortunate experiences in the United States before the Constitution was adopted, made quite clear the need of such exemption. Moreover, the residents of the federal district are largely government officials, or those who have come to the District for its advantages of residence. They have no especial claim to a local vote. A delegate from the District, with a voice but no vote in the House, like territorial delegates, would serve to represent the views of residents. But the states in Congress assembled should have supreme power within the seat of the federal government.

The great field of state rights, so drastically invaded by

Amendments XV and XIX, has not been considered, it will be seen, to any material extent, in these suggested amendments. It is perhaps reasonable for federal legislation to prescribe the conditions of federal suffrage. It is wholly unreasonable for federal legislation to prescribe the conditions of state suffrage. It would be better to leave states free to prescribe the conditions of all suffrage, within the limits of citizenship in the United States.

Legitimate State Rights

III

THE FEDERAL GOVERNMENT—MODE OF SELECTION AND TERMS OF OFFICERS

In the 68th Congress no less than twenty joint resolutions to amend the Constitution with reference to the mode of selecting officers of the federal government and to their terms of office were introduced, three in the Senate and seventeen in the House.

These were in some cases aimed to remedy defects which experience has plainly developed, in others they seek to embody various theories of political organization which have more or less cogency. Nearly all of these plans relate to the executive and legislative branches.

1. *The Date of Beginning the Term of the Executive and of the Congress*

The fourth of March became fixed as that of the inauguration of a new federal government under the exigencies of communications in 1788–9. It was the duty of the existing Congress of the Confederation to set the new government in motion. The Act of September 13, 1788, fixed the first Wednesday in the following March (1789) as the date of the beginning of the government under the Constitution, and that Wednesday fell on the fourth day of the month. With mod-

ern methods of communication and transportation the elections both for presidential electors and for members of each House of the Congress, occurring early in November, and on the same day throughout the union, are rather promptly conducted and the results are made public in a few days at most. When the Congress meets early in December the facts are known. The existing Congress is still in office and continues to legislate until the fourth of the coming March—although the new Congress just elected and which will succeed on that date may have a totally different party control. The President still holds his place for four months after the election, his successor, often of a different political faith, having no voice in government for those months.

If there is no pressing need for specific action no particular harm follows this peculiar period between parties, and the leisurely way in which the new administration proceeds with its plans of organization is practically unobjectionable. There may be some partisan infelicities due to the interim—as for instance the Federalist organization of the Courts of the United States in 1801, which gave rise to much complaint from the friends of Jefferson, the new President, but which after all gave the nation the great benefit of John Marshall as Chief Justice. If a national emergency intervenes, grave difficulties may be confronted, as was the case in the months following the election of 1860. Had the presidential election of 1916 had a different outcome the international policy of the United States might have been difficult to manage during those critical days. Of course there is not with us the need for an immediate change following the election such as prevails in Great Britain and other countries which have the system of cabinet government and a controlling parliament. With them the new parliament determines the executive, and if there is a change of party the electoral mandate demands an immediate determination.

Seven joint resolutions of the 68th Congress would fix the

beginning of a new administration for January instead of March.

Proposed Plans for Prompt Accession of a Newly Elected Government

Under most of the plans the electors would be chosen in the states in November, the electors for President and Vice-President would meet and cast their ballots in December. The Congress would meet the first Monday in January, the electoral votes would be presented to the two Houses and the result announced the second Monday in January, and the term of office of the President and Vice-President would begin at noon on the third Monday in January.

Two joint resolutions in the 68th Congress (H. J. Res. 58 and 93) would fix the beginning of the new term of the Congress on the fourth day of January and of the President on the twenty-fourth of that month.

Should there be no choice of President by the electors, the House would at once proceed to choose from the highest three candidates, as at present—and the Senate under like conditions from the highest two. This it is evident would leave only one week before the beginning of the new executive term—rather a short time should there be a protracted contest. The House in 1801 balloted from the 11th to the 17th of February, and in 1877 the Congress announced the election only on March 2—two days before the inauguration.

Further, there is always the possibility that one House or the other of the Congress may not find it practicable to effect prompt organization for business. In 1839 it was four days after convening before a temporary chairman could be chosen and a speaker was not elected for three weeks. The thirty-fifth Congress met on the first Monday in December, 1855, and succeeded in electing a speaker only on the second day of February following.

These contingencies are recognized in several of the pending plans. If a President is not chosen by the time for the beginning of the term, the Vice-President shall act as President until the House has elected a President. If, however,

there shall also be no choice of a Vice-President, then the Congress may by law determine what officer shall act as President until one House or the other shall effect an election.

These plans would seem entirely rational and would certainly obviate the existing needless delay in the meeting of the new Congress, and at the same time would guard against the vague possibilities of the present situation. Also there is no invasion of the reserved rights of the states, and practically no added powers given to the Congress. Some one of the joint resolutions embodying these plans, therefore, deserves careful consideration by the Congress and by the states.

2. *The Length of the Term*

Four Years for Representatives

One plan would extend the term of representatives to four years instead of two (H. J. Res. 95).

This proposed extension of the term of representatives is perhaps natural, being introduced as a House measure. Whether it would appeal to the people throughout the states is probably quite another matter.

The President's Term

The four year term of the President is usually hardly sufficient to enable the chief magistrate to carry out specific policies of far reaching effect and for that reason a successful President has usually been given a second term. There is nothing in the Constitution to prevent subsequent elections as well. Jefferson, in fact, regarded that as one of the grave defects of the Constitution. The custom of denying a third term, however, has now become so firmly established that there seems little likelihood of its being changed. The experience of so popular statesmen as Grant and Roosevelt—the one failing to secure a nomination for a third term from his party convention, the other appealing from the convention to the people with the result merely of defeating the party which had theretofore elected him, but without himself win-

ning—this experience will hardly encourage future attempts at a twelve year presidency.

The President—Six Years and no Reëlection

The fact, however, that an administration is likely to use great exertions for securing a second term certainly lessens the independence of the executive and tends to subordinate the public good to party and personal needs. To remedy these evils it has frequently been suggested that the term should be extended to six years, with ineligibility to a term immediately succeeding, or to any succeeding term. This was the plan adopted in the Constitution of the Confederate States, and is embodied in H. J. Res. 185—"The Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of six years, together with the Vice-President, chosen for the same term, but both shall be ineligible to any second election to such respective offices." S. J. Res. 6 is essentially to the same purport.

As such a plan would tend to make the Executive more independent of the legislative branch than is now the case it may be doubtful whether a two-thirds vote in each of the two Houses of Congress can be secured for it. It is also well within the limits of possibility that some grave national emergency might make a second succeeding term highly desirable.

3. *Mode of Election of the President*

The President Elected by the States

Under the Constitution the President is elected by the states. The votes of states are cast in the first instance by electors, each state having weight in the election determined by its representation in the two Houses of Congress. Thus the fundamental compromise of the Constitution whereby states are equally represented in the Senate and according to population in the lower House, is carefully preserved. The election is by states and under this specific system of representation, and the greater or less popular majority or plurality cast throughout the union for electors is immaterial.

Should no candidate have a majority of the electors, then again the election is by states. The votes of the states are cast by the state Representatives in the lower House of Congress, but in this the compromise of the Constitution is disregarded and the states are exactly equal. each having one vote and no more.

Election of the House

Twice, in 1801 and again in 1825, the election has been thrown into the House of Representatives. As the votes of the states in this body are limited to the three candidates having the largest number of electoral votes, the House is not free to depart altogether from the questions involved in the canvass before the people.

The Electoral Commission, 1877

Once, in 1876–7, the question of fact as to which candidate actually received the vote of a majority of the electors, was sharply at issue and was only settled by an agreement in the two Houses of Congress which was based on an electoral Commission—a body which in law could be regarded as merely a committee of advice.

Act of Feb. 3, 1887

A subsequent statute provided a plan which was intended to secure the future against the recurrence of so dangerous a situation. It does provide for many exigencies—perhaps for all that are likely to occur.

Present Procedure in the States

The Constitution (Art. II, Sec. 1, § 2) ordains that each state shall appoint its quota of electors "in such manner as the legislature thereof may direct." Under this provision for a long time many state legislatures themselves appointed the electors. There were states, too, which for a time had electors chosen by districts, excepting of course the two who represented the number of Senators. But now all are chosen by popular vote (subject to the limitations of Articles XV and XIX of the amendments) on a general ticket in each state. The remaining procedure is determined by the Congress.

And in Congress

The Constitution (Art. XII of Amendments) provides for putting the votes of the electors in the hands of the President of the Senate, directs that he shall open the certificates in the

presence of the Senate and House, and then says "the votes shall then be counted." It is not said who shall count them, nor is a word said as to procedure in case any of the alleged votes in the hands of the President of the Senate are challenged. The act of 1887 is intended to cover this ground—but it would surely be better if the Constitution were more explicit. In the act the Congress has assumed the power of acting as a court for the decision of controversies.

The System of Electors

The system of electors has some disadvantages. Thus far no actual corruption of individual electors has occurred—the trouble in 1876–7 related to the question as to who had actually been chosen as electors. Whatever may have been the original intention, the electors uniformly vote for the candidate of the party by whose vote they have been elected. In 1821 the only real exception occurred—there were no electors opposed to the reëlection of President Monroe, but one in New Hampshire cast his vote for another person because he thought that only Washington should have the record of a unanimous election.

The present system, then, involves electors, chosen in such manner as the several state legislatures may determine.

Suggested Electoral Votes in Place of Electors

One plan would eliminate the electoral colleges, giving each state a number of electoral votes equal to the number of electors now provided (S. J. Res. 32; H. J. Res. 46).

It is true that there have been, as in 1876, doubtful questions affecting certain electors. But the electoral vote system does not provide for the contingency of the death of either the newly designated President or the newly designated Vice-President after the November election and before the beginning of the executive term. Presidential electors could act in such an emergency.

Suggested Direct Popular Election

Another plan (H. J. Res. 29 and 185) would have the President and Vice-President elected by direct popular vote throughout the union, not by states, a plurality of the total vote sufficing to elect.

This sapient method hardly requires comment—the bearing of it on a close vote with perhaps 50,000,000 who have the franchise, and on possible local frauds and inaccuracies, is fairly obvious.

Federal Control of Primary Elections, H. J. Res. 185 and 46

It may be noted that one of these proposed amendments (H. J. Res. 185) also would require a nationwide primary election, controlled by the Congress, for the nomination of party candidates. The methods of Jerusalem Cross Roads, in other words, would be extended over a hundred million people. Further, it is plain that this plan again would strip the states as such of vital political rights. No longer would the President be the choice of a federal republic, but of a consolidated state, the electorate voting in mass and not by state units. In practice dangerous, it is also in essence destructive of the most fundamental principle of the republic.

The proposed control by the Congress of primary elections and of the nomination by political parties for the presidency has another bearing on the approach to a centralized despotism. Freedom of organization has been held among the essential rights of citizens in a free state. But there are many legislative tendencies which seem to be taking away this among many ordinary rights.

A Judicial Determination of Contested Elections

The existing plan of deciding a contested election by Congress, itself a political body and one which may itself be in question in the same election, should any of these proposed plans be adopted, is open to grave doubt as to its wisdom. Such disputes as marked the Hayes-Tilden contest of 1876–7 certainly turned on questions of law and fact which called for a judicial determination. The Supreme Court is such a body—is a continuous body—is more likely to have general confidence than any political legislative chamber whose re-election would soon be at hand—it would seem that the Supreme Court might well be vested with jurisdiction over any dispute as to the election of President and Vice-President of the United States.

One of course is aware of the objection to drawing the Supreme Court into questions supposed to be political. Whether it is more dangerous for a judicial body to pass on questions of law and fact in a political matter than for a political body to perform judicial functions, may well orceive thoughtful considerations.

4. *Mode of Electing Senators and Representatives*

As both Senators and Representatives are now chosen by popular vote, and as Congress already has the power to regulate such elections, it has not appeared desirable in either House to introduce any changes.

It has, however, appealed to some to provide a federal control of primary elections for determining party candidacies for their offices, as well as for the offices of President and Vice-President.

These provisions are all in the direction of stripping the states of power and vesting such power in the Congress.

5. *Apportionment of Representatives*

The apportionment of members of the House of Representatives among the states is on the basis of population as determined by the decennial census—but each state has at least one Representative.

The actual decennial distribution of members is now, under the Constitution, made by act of Congress. In two of the plans for amendment (H. J. Res. 117 and 118) it is proposed to transfer this power to the President—leaving to the Congress the power to determine the whole number of members. This latter power is the really important thing. Distribution is largely a ministerial function.

A plan suggested in the 67th Congress for apportionment on the basis of actual votes cast rather than on that of total population, does not seem to have been presented in the 68th

Congress. This is found in S. J. Res. 47, 67th Congress, and recites that representatives shall be apportioned decennially "according to the vote counted at the presidential election next preceding such apportionment."

Apportionment may be based quite reasonably on total population, or on the whole number of legal voters, or on the number of the latter who actually use their franchise.

There is much to be said in favor of this last basis. Probably states which have a large population as compared with the usual vote cast would be apt to oppose the change.

Another joint resolution for amendment offered in the 67th Congress does not seem to have reached the 68th. S. J. Res 44, 67th Congress, proposed that the apportionment of representatives be based on "the respective number of electors vocationally." This would give a certain number to farmers, a certain number to blacksmiths, a certain number to druggists, and so on indefinitely. Comment is needless.

6. *Selection and Tenure of Federal Judges*

Under the Constitution as it is federal judges are appointed by and with the advice and consent of the Senate. They hold their office "during good behavior," and their salaries cannot be diminished during their continuance in office.

By this system the judges are kept as far as practicable from the vicissitudes of politics. Selection by the President is so conspicuous an act as to guard very effectively against unworthy appointments, and the Senate's approval is a further device for safety in the same direction.

It is true that the administration will usually choose within the limits of the dominant political party, but the long and safe tenure of the judge makes for that independence of the bench which is essential to the security of law and as well to the protection of the individual in his fundamental rights.

The Congress and the Executive have only the powers vested by the Constitution. The inevitable tendency of

human nature leads those respective political agencies to seek expansion of their authority. If there is no independent check on such encroachments the limitations of the fundamental law are futile. The only check which the wit of man has yet been able to devise is found in the present mode of selecting the judges and in their secure tenure.

Naturally enough the Congress would often prefer to decide for itself as to the limits, if any, within which legislation must be confined. Hence frequent attempts have been made in one way or another to break down the barriers.

Such an attempt is found in a proposed constitutional amendment introduced in the 68th Congress (S. J. Res. 93). By the provision of this plan, the judges of the Supreme Court must be selected from the judges of the inferior courts, and the Congress is given power to provide by law for their mode of selection and for the length of their term of office. Further, the judges of the inferior courts would be chosen by popular election within their respective districts, the Congress having power likewise to fix the tenure of these judges. The Congress also might, if they should see fit, permit the President to appoint the incumbents of the Appellate Courts.

Of course the whole tendency of this plan would be at once to drag the entire federal judiciary into politics, and to nullify to a great extent the protection which the Constitution at present has against the pretensions of the Congress.

The case of Trevett v. Weeden:

What a legislative body may do when the judiciary is subject to legislative control may be seen by what happened in Rhode Island in 1786.

Coxe, Judicial Power 234 sq.; McMaster I, 332-9

An act was passed in that year providing an issue of paper currency. The bills were to be loaned on security of land valued at double the amount of the loan. By a later act, heavy penalties were to be laid on those who should refuse the new currency at par with gold, and also any such case should be tried without a jury and without appeal.

A butcher, Weeden, refused to one of his customers,

named Trevett, acceptance of paper shillings for beef except at a heavy discount. Weeden was brought before the court on complaint of Trevett. Judges under the law of Rhode Island at that time were appointed by the legislature for a fixed term and were removable by that body. Even so the Court held that the case was not cognizable by them, as the legislature had exceeded its powers in depriving the accused of the right of jury trial as guaranteed in the fundamental law of the state, the old charter.

Thorpe, I, 268–72

The judges were promptly summoned to appear before the legislature, they were sharply rebuked for their action and their removal was nearly ordered. As soon as their limited terms expired, four of the five judges were displaced by others who were amenable to the legislative will.

The proposed popular election of federal judges of the district courts for a fixed term would make the designation of such judges a matter of the ordinary scramble of local politics, and would tend to fix their eyes on the next nomination rather than on the correct interpretation of law if that interpretation happened to be unpopular.

Moreover as the justices of the Supreme Court must be taken from the list of judges of the inferior courts, there could be no possibility of selecting for that august body any one of the eminent lawyers who might not choose to submit to the turmoil of a political campaign.

This proposed joint Resolution for amendment of course would make the federal Courts subordinate to the Congress and at the same time would destroy the independence and hence the character of the whole body of judges.

The federal Courts—in the end the Supreme Court—are guardians of the Constitution—guardians of the states and of the people against encroachments by the Houses of Congress.

It is true that the members of those Houses are elected by the people. But they are elected subject to the Constitution

—the people themselves cannot lawfully entrust to their Senators and Representatives in Congress any power not granted by the Constitution unless by the orderly process of Constitutional amendment.

The tenure of the federal judges during good behavior is essential to their independence in order that they may hold the other two branches of the government within the constitutional restrictions.

Attempts to Subordinate the Supreme Court

The Congress more than once has been restive under this restraint—it has been suggested in a variety of ways that the Courts may be made subordinate to Congress, or that the Congress may be freed from the Courts.

Three joint resolutions for Constitutional amendment were introduced in the 67th Congress intended to curb the Courts.

S. J. Res. 94, 67th Congress, would prescribe for the inferior Courts a fixed term—to be fixed by Congress—of not less than ten years.

Obviously this would make it possible to eliminate obnoxious judges and so to keep the Courts obedient to Congress.

H. J. Res. 15, 67th Congress, reads: "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but two of the judges."

H. J. Res. 436, 67th Congress, runs as follows: "Congress shall have power to determine how many members of the Supreme Court shall join in any decision that declares unconstitutional, sets aside, or limits the effect of any Federal or State law, and may further provide by law for the recall without impeachment proceedings of any judge of the Court, or a review or setting aside of any such court decision, providing that not less than two-thirds of the vote of both Houses shall agree in such recall or review."

Of course the purport of these proposed amendments is to destroy one of the most vital balances of the Constitution—to subordinate the judicial branch to the legislative branch—

to nullify all limitations on the powers of Congress—to change that body into an omnipotent parliament, superior to the Constitution.

A Double Check on the Congress

There is at present a double check on the Congress—the President's veto, which may be based on his opinion of the unconstitutionality or of the inexpedience of proposed legislation; and the negative of the Supreme Court, which can be based only on the ground of unconstitutionality. The President's negative can be overridden by a two-thirds vote of each House—two-thirds of those present, a quorum being presumed. But the negative of the Court is absolute as against the Congress—it should be, as the organic law is in peril and should be protected.

If the measure declared null by the Court involves principles which the people seriously wish made lawful, the Constitution can be amended. This was the course of proceedings which led to the adoption of the Sixteenth Amendment, giving Congress power to lay an income tax without apportionment among the states. If there is not a deliberate and settled popular demand for amendment in order to enable the Congress to continue in legislation which the Court holds contrary to the Constitution as it exists, it follows that there is a tacit popular approval of the Court's decision.

Jefferson's Works, III, 4

The Constitution was enacted in order to prevent tyrannical government. The tyranny of a legislature is quite as dangerous as that of a single dictator—and more obnoxious. Jefferson saw this danger plainly at an early date. In a letter to Madison, March 15, 1789, he said:

Supra, p. 27

"The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in time; but it will be at a remote period."

IV

THE FEDERAL GOVERNMENT—RESPECTIVE POWERS OF THE THREE BRANCHES

1. *Increased Power of the President*

One need not wonder that on the whole plans for constitutional amendment introduced in either House of Congress are apt to look towards an increase in the powers of that body, and no surprise may be felt that such plans do not as a rule contemplate an increase of power in other branches of the government.

The Power to Disapprove Items in Appropriation Bills

Only two of those under discussion (H. J. Res. 105 and 108) seem to suggest an increase in the power of the Executive. They are practically identical with resolutions, introduced in the 67th Congress, in the Senate by Mr. Kenyon, July 12, 1921, and in the House by Mr. Madden, July 19, 1921, and they would give the President the power to disapprove items in any appropriation bill. This salutary authority for the Executive, already in force in New York and in other states, would go far to prevent wasteful legislation, leaving each separate appropriation to stand or fall on its own merits. There would be no more "riders" on desirable bills—the "pork" could be deleted from bills containing necessary appropriations. A clear test of the public spirit of the two Houses of Congress may easily be found in the fate of so excellent a measure. It is in the interest of honor and economy in the use of the public funds, it is opposed to the interest of one of the worst forms of selfish politics.

Ratification by a Mere Majority of the Senate

Indirectly another plan would somewhat increase the President's power in making treaties. S. J. Res. 15 would require a majority of the Senators present, rather than two-thirds, for the ratification of a treaty.

S. J. Res. 26 would require only a majority of each house of Congress to ratify treaties—perhaps this would not be so

difficult as it sometimes is to secure a vote by two-thirds of the Senate, as is now required.

2. *Increased Powers of the Congress*

(1) *Domestic Relations*

Seven joint resolutions introduced in the 68th Congress would amend the Constitution so as to add to the powers of the Congress the power "to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce" (S. J. Res. 5). Four of the seven add a clause reserving to the states the power to prohibit, as to its citizens, any causes for absolute divorce.

Joint resolutions to amend the Constitution so as to give Congress control of the law of family relations have been offered for years past. In the 67th Congress there were four such, two in the Senate and two in the House (S. J. Res. 31 and 273, H. J. Res. 83, 426).

As a rule it would seem that the proponents of this legislation desire uniformity of such sort as to make the law relating to divorce more strict than it is in some states; and also to put it in the power of Congress to prevent any state from recognizing as lawful such customs as at one time prevailed in Utah. Polygamy involving simultaneous plural marriage, on the one hand, and successive polygamy made possible by the facile divorce laws of certain states, on the other, are revolting to the moral judgment of a great majority of our people. Just now uniform laws operative in all the states, or one federal law applicable throughout the republic, are the two ways by which the evil may be remedied. The first is difficult—it is not easy to induce all of the forty-eight states to see the desirability of adopting the same standards in these

matters. Therefore the power is sought to use federal compulsion.

State Liberty Better

One may be in entire accord with the humane purpose to be attained by these centralizing proposals and yet quite skeptical as to the wisdom of the proposals themselves. It would require more effort and take more time to secure general adhesion by the states in a policy of guarding the family relation, but in the end the wide education required to secure such action would place the whole policy on a much more durable basis and would be more wholesome for the community at large. Moreover, times change, and social standards gradually fade into new ones. We cannot be at all sure that a popular change might not carry with it a majority at Washington for making loose family doctrines the basis of federal law. In that case states, possibly many, would be constrained against their will to permit situations shocking to the general conscience within their limits. This could be remedied only by virtue of another amendment—itself unlikely.

Perhaps after all it would be better not to infringe state liberty—perhaps it would be more salutary to trust to sweet reasonableness for moral reform, rather than to federal coercion.

Polygamy

One other joint resolution was introduced forbidding polygamy—perhaps with Utah in mind, perhaps looking at the Moro Archipelago (H. J. Res. 114). Polygamy is not lawful in Utah, and the Moro question goes into a religion far older and far more wide in its popular basis—comprising hundreds of millions in Asia and Africa—than has been in the past the case with the Mormon Church.

(2) *Child Labor*

For years past an active campaign has been carried on with the aim of securing state legislation calculated to prevent the exploiting of children in industrial pursuits.

That some restriction should be put on those who selfishly

U. S. Department of Labor. Children's Bureau; Child Labor in the United States, Bureau Publication, No. 114, Sept. 1924

use the very young for the production of wealth, without regard to the physical or moral effects of the strain of arduous labor on tender bodies and immature minds, is granted by all right thinking people. All the states have recognized this as a vital truth, and accordingly some sort of child labor legislation has been enacted in every state. But much of this protection is inadequate. Some states are far behind in the humane policies which seem only reasonable in these days which we call enlightened. Especially difficult in the way of the reform is the fact that states which permit cheap labor of this kind make it easy for mines or factories within their limits to compete successfully with industries in other states which have rigid laws on the subject.

Despairing of securing general legislation in all the states which would afford adequate protection for the young, the advocates of restrictive legislation turned to the Congress of the United States and succeeded in securing federal legislation.

Act of Congress 1916

The act of 1916 was based on the power of the Congress to regulate interstate commerce, and prohibited the transportation across state lines of the products of factories which used the labor of children under 14, or which allowed those between the ages of 16 and 18 to work more than eight hours a day, or more than six days in the week, or between the hours of 7 p. m. and 6 a. m.

The Act Unconstitutional Hammer v. Degenhart, 247 U. S. 251, 1918

A suit under this act was decided by the Supreme Court in 1918. The Court held the act unconstitutional and hence void, as not being really a regulation of commerce at all. It obviously aimed to enter into the states and control certain actions of business therein in the interest of the welfare of society. This, the Court holds, was a mere exercise of the police power which was reserved to the states. It was pointed out that the articles whose transportation was prohibited by this law were in themselves innocuous, and that the evil which it was designed to prevent lay wholly in the method of their manufacture. Other laws interfering with interstate com-

merce had been upheld by the Court, but the articles of such traffic were noxious in themselves—lottery tickets, diseased cattle, adulterated foods, poisonous drugs, and the like.

Dissenting Opinion of Justice Holmes

This case was decided by a divided Court—5 to 4—and the dissenting opinion made a strong case of precedents in favor of the validity of the act.

But after all one is tempted to ask whether, if the dissenting opinion should hold, there is any limit at all to the power of Congress over interstate commerce. In these days there is no actual business wholly intrastate but the smallest retail traffic. If Congress can destroy any commerce which it disapproves by merely forbidding its crossing state lines, the power of Congress over all business would seem supreme. Nothing would be exempt, and so far as commercial affairs are concerned the states would vanish, and the federal government would be absolute.

Also Harvard Law Review, Vol. 32, p. 45

Act of Congress of 1919

In the year following this decision Congress made another attempt to deal with the abuses of child labor by statute, this time under the guise of the taxing power. In the revenue act of 1919 a tax of 10 per cent of the net profits for a year was imposed on any business which employed young persons who came under the clauses of the act of 1916.

This Act also Unconstitutional

When the validity of this act came before the Supreme Court (1922) the Court held the act unconstitutional as exceeding the powers of the Congress. In the opinion of the Court the 10 per cent imposition was not a tax, but a penalty. "It provides a heavy exaction for a departure from a detailed and specific cause of conduct in business." Grant the validity of this law and all that Congress would have to do to take over jurisdiction of anything reserved to the states would be to prescribe regulations and then to fix a penalty tax for departure from such rules. "To give such magic to the word 'tax' would break down all Constitutional limitations on the power of Congress and completely wipe out the Sovereignty of the States."

Bailey v. Drexel Furniture Co., 1922, 259 U. S. 20

In short, while the Court has gone far to sustain the powers of the Congress, still it recognizes that those powers are not unlimited—that after all there are states with considerable reserved powers of their own. This decision was nearly unanimous—8 to 1.

Having failed under the existing powers of Congress to secure federal legislation prohibiting the exploitation of the very young for commercial purposes, the last recourse was to secure an amendment of the Constitution vesting such power in Congress.

Constitutional Amendment Sought

Twenty-five joint resolutions to this effect were introduced in the 67th Congress, and twenty-six in the 68th.

Unlike the Eighteenth Amendment these various plans contained no legislation—they did not embody a prohibition of any form of child labor, but would give Congress power to legislate on the subject.

Several of them contained also the power of legislation restricting the labor of women.

Amendment Recommended to the States

One of these joint resolutions (H. J. Res. 184) received a two-thirds vote in each House of the Congress (June 3, 1924) and accordingly was sent to the states for ratification. It runs as follows:

Article ———.

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

The Question at Issue

Before the states now is the question of the wisdom of embodying this as an amendment to the Constitution, and thereby transferring an important part of the police power

from the states to the federal government.* The question is, which government under our federal system, that of the state or that at Washington, should enact the needful laws. To convince the people in each of the 48 states of the wisdom of the humane procedure which should be followed, is a weary process. The short cut is so much easier—it is so simple relatively to bring the pressure of organized altruism to bear on the small number of legislators at Washington rather than on 48 times that number.

The Pressure on the Congress

No less than 17 organizations were listed as urging on the Congress the submission to the states of a child labor amendment. Among these are the American Federation of Labor, the Federal Council of the Churches of Christ in America, the General Federation of Women's Clubs, and the National Education Association. With so powerful a backing, there is no wonder that many members were found who were eager to introduce joint resolutions of this character, and that a large vote was secured in each House of the Congress—297 to 69 in the House of Representatives and 61 to 23 in the Senate.

Comments

The action of state legislatures will be determined by many considerations. On the one side will be the pressing humane appeal to provide at once for the protection of children. On the other side will be the purely commercial desire to get cheap labor. But other weighty matters should also be taken into account before so momentous an action is taken.

After all it is a question of relative values. Which is better for the republic, to attain the desired end slowly by converting state after state to the reform, or once more to lessen the reserved powers of the states and add to the rapidly increasing powers of the central government? More and more scope for congressional legislation, more and more field for lobbies

* In December, 1924, a joint resolution was introduced in the Senate (S. J. Res. 148) for the repeal of the above joint resolution. No action was taken. The interesting question is raised whether the Congress has the power to repeal a joint resolution for amending the Constitution after it has been submitted to the states and while state action is pending.

at Washington, more and more bureaucratic machinery for federal administration—this is the dangerous drift of centralization in these days. Patience is a virtue too much neglected by reformers. Real reforms are far better and more firmly established by industrious and widespread education of the people rather than by sudden imposition from above. Those who decide their action by reason rather than by emotion, those who reach a conclusion on the merits of the question rather than by its bearing on their political fortunes, will at least give careful consideration to this feature of the subject.

An attempt has been made to repeal the Child Labor Amendment submitted to the states. This is found in Senate Joint Resolution 148, but considering the votes on the adoption of the one in question (p. 159) it would seem that repeal can hardly be expected at the present time.

(3) *The War Power*

Conscription of Citizens and Property

Three joint resolutions introduced in the House (Nos. 76, 85 and 271) apparently were intended to add specific powers to the Congress in carrying on war. They all provide that in case of war the Congress may provide for the conscription of all citizens and of all property of citizens, for the defense of the Nation.

It would seem that the Congress already has this power. Conscription of persons for the army and the navy surely has been the principle of service in our last two great wars, and conscription of persons for other war services would rest on the same legal basis; and war taxes are a rather obvious conscription of property.

Restriction of Profiteering

One of the measures (No. 76) also would give the Congress the power to limit the profits for the use of capital and labor engaged in war industries.

War profiteering has been a notorious scandal in all wars—it froze and starved Washington's soldiers at Valley Forge, it

clad Union troops in the Civil War with shoddy, it enormously increased the cost both of labor and of materials in providing Pershing's army with munitions. Whether an act of Congress could deal adequately with so complex a matter is another question.

(4) *Income and Inheritance Taxes*

The Sixteenth Amendment gave the Congress power to tax incomes without regard to the rule of apportionment on the basis of population as required by Art. I, Sec. 9, § 4 of the Constitution. But state and municipal securities are exempt from federal taxation. In the words of the Supreme Court, "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state."

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 584

As soon therefore as a federal law was enacted taxing incomes, private capital began to flow into state and municipal bonds. By this means a large volume of wealth escaped the federal tax. This has been especially the case with properties yielding large incomes, subject to a heavy surtax.

How to Deal with the Difficulties

From the point of view of the taxing authorities there are two ways of dealing with this situation.

One would be to cut down the surtax. Reduced to a certain point, there would be a positive inducement for capitalists to transfer their holdings from state and municipal bonds, which yield a low rate of interest, to many productive enterprises, the profit of which even when a reasonable income tax is deducted, would still yield a larger return than the nontaxable securities with their low returns. Further, this method would yield a larger tax return than that now in force.

The other method, much less subtle and therefore more appealing to those who reason with emotion rather than with

intellect, is to use force. Prevent investment in non-taxable securities. Give the power at once to tax all securities. This is so simple a way of attaining the desired end that it is urged even by many thoughtful people.

Amendment Sought

With this purpose in mind many attempts have been made to amend the Constitution so as to vest in the Congress the power of taxing the income from state and municipal bonds without apportioning on the basis of population. But of course the converse must also be granted, and states permitted to tax federal securities. Eight joint resolutions for such an amendment to the Constitution were introduced in the 68th Congress.

One of them (H. J. Res. 161) also would give the Congress power to levy an inheritance tax, and goes into elaborate details of legislation in grading the same.

McCulloch v. Maryland, 4 Wheaton 316

But the immediate purpose of legislation is not always identical with its actual outcome—and there are some rather obvious implications of the taxing of governmental securities which should not be forgotten. "The power to tax" the Supreme Court says "involves the power to destroy." For this reason the Constitution carefully protects from each other the two essential units of the federal structure—the federal government and the states. That they should coexist, that each, within its constitutional sphere, should be independent of the other, is a truism of our constitutional law. Without this security of their respective autonomy the federal system would go to pieces—either into a centralized state, with subordinate local units, no longer states of the union; or into an incohesive aggregation of discordant political entities, like the United States under the Articles of Confederation. The balance between the federal government and the states, which is the breath of life of the federal republic, should be watched anxiously.

Obvious Dangers

If the states have the power to tax federal securities one can see at a glance many possible—even probable —dangers.

Federal bonds might be taxed entirely out of some states. The whole purpose of the issue might be so hampered as to be crippled. War necessities might be impeded, public works of importance, like the Panama Canal, might be hindered, and at the least there easily might be unseemly discord between state and Nation. One primary purpose of the Constitution was to enable the central government to act directly on the individual, at least for specified purposes, without the intervention of the states. If Congress cannot protect the holders of bonds issued by its authority, the value of such bonds could not always and everywhere be sustained.

But if state power to tax federal securities would lead almost inevitably to embarrassment for the federal government, the power of Congress to tax state securities is a more open invitation to interference in state affairs by a power outside the state. The power to tax is the power to destroy. This power has been used to prevent the issue of state bank currency authorized by state law, and the power was held valid by the Supreme Court (Veazie Bank v. Fenno, 8 Wall. 533). No doubt the monopoly of paper currency by the central government is a general convenience. But one can see quite readily that a controlling party in the federal government might disapprove state policies on public highways, on state canals, on state irrigation and reclamation projects, on state sanitary policies, all made possible by the sale of bonds, and all liable to be put out of existence by a federal tax. State freedom would be subject to federal control to an extent difficult to foresee—another long step would be taken towards a centralized authority at Washington.

3. *Decreasing the Powers of the Congress and of the States*

(1) *Declaration of War*

Under the Constitution (Act I, Sec. 8, § 11) the Congress has the power "To declare War." Five times thus far such

action has been taken—in 1812 against Great Britain, in 1846 against Mexico, in 1898 against Spain, and in 1917 against Germany and against Austria-Hungary.

A Referendum on Declaring War

Three joint resolutions in the 68th Congress (S. J. Res. 8 and 48 and H. J. Res. 134) would limit this power to certain emergencies—"Except in cases of invasion or when the danger is so imminent as not to admit of delay" (S. J. Res. 8). Otherwise there should not be a state of war declared unless approved by a referendum throughout the Union.

The complications involved in such a plan would be bewildering. Of course the Congress would have to be the judge of the imminence of the danger which would warrant that body in a declaration of war. There might always be doubt as to the character of such danger. It was attacks on our shipping on the high seas which led to war in 1812 and in 1917. Would such attacks constitute an imminent danger, or would they have called for a referendum vote under the proposed plan? One of the plans (S. J. Res. 48) would authorize the Congress to declare war when the United States is invaded. In 1846 the American administration held that Texas, which we had annexed, was invaded by Mexican troops. The Mexican government held that, quite aside from the validity of the annexation of Texas, American forces had invaded Mexican territory.

A referendum vote on a war question would be appalling, in view of the possibility of a close vote, of dispute as to the actual vote in some constituencies, and of frauds in some cities. We can understand a contested election on the choice of candidates—but a contested election on a declaration of war!

(2) *Appropriations for Sectarian Purposes*

One proposition of amendment (H. J. Res. 159) would forbid any governmental authority, nation, state, or civil division of a state, to make any appropriation of public funds to aid any religious organization.

Here again is a limitation which might very properly be left to the states, so far as they are concerned. Public opinion, one way or the other, both in nation and state, should be a sufficient guide.

(3) *The Eighteenth Amendment*

One Joint Resolution (H. J. Res. 273) would simply repeal the Eighteenth Amendment.

H. J. Res. 81 would submit to a referendum throughout the United States a relaxation of the Eighteenth Amendment so far as beer and light wines are concerned.

H. J. Res. 27 proposes a similar referendum, with the further proviso that of the revenue from taxing beer $5,000,000,000 shall be reserved as a bonus for soldiers of the World War.

It is much easier to adopt an amendment to the federal Constitution than it is to rescind one afterwards.

4. *Increasing the Power of the Supreme Court*

H. J. Res. 9, 67th Congress, would empower the Supreme Court to decide the fact of the inability of the President to perform his functions (Art. II., Sec. 1, § 5), "when authorized by concurrent resolution of Congress."

This would remedy a very embarrassing situation—a situation which possibly existed during the serious illness of President Wilson near the end of his second term.

V

RIGHTS OF CITIZENS

Four propositions of amendment introduced in the 68th Congress would if adopted be additions in the Bill of Rights (vide Ch. II).

Two of them (S. J. Res. 21 and H. J. Res. 75) are identical

—"Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."

It might be pointed out that *equality* and *identity* are not the same thing—but equivalence is not always easy to establish.

We may also notice that equality of *privilege* is also another consideration. In many states women have privileges—certain legal safeguards—which men do not have. If equality of rights means also identity of privilege the amendment might be a dubious boon.

Two other joint resolutions embody definitions of treason against the United States. One (H. J. Res. 130) would include in the definition "attempting to incite by word or deed the establishment of any new form of government except by amendment to this Constitution as provided herein." The other (H. J. Res. 178) would make treason any form of fraud against the government in time of war. Fraudulent profiteers in war material are undoubtedly especially obnoxious. Whether they cannot be punished sufficiently under the ordinary criminal law without the necessity of an amendment to the Constitution, is perhaps worthy of consideration.

Some Comments

The federal Constitution went into operation in 1789. Since that time a year has not passed without one or more propositions of amendment being introduced in the Congress.

More than 2500 Plans for Amending the Constitution Introduced in the Congress

In the first century, 1789–1889, upwards of 1300 resolutions of amendment were introduced. Of these, three only were proposed by the Congress and ratified by the states (Amendments XIII, XIV, and XV).

Since 1889 nearly as many resolutions—upwards of 1200—have been introduced in the Congress. Of these four have been proposed by the Congress and ratified by the states (Amendments XVI, XVII, XVIII and XIX). One, vesting in the Congress power to regulate child labor, has been

proposed by the Congress and is before the states for ratification.

Several others, for instance the one which would give equal rights before the law to men and women (S. J. Res. 21), are urged on the Congress by organized bodies of proponents. They feel aggrieved because they do not seem able to convince all the states immediately of the wisdom of the legislation demanded, hence a constitutional amendment is sought, in order to coerce the recalcitrants.

The vast majority of the amendments introduced by members of either House of the Congress never get farther than reference to a committee. The probability of affirmative action in any of these is doubtless remote. They indicate what is in the minds of some of the people, no doubt. In the great population of the republic many political notions may be expected to float around. They are a source of nterest to some people, and it is well that people should be interested in public questions—and it is quite as well for the general advantage that most of these notions should gradually fade away into space.

Still, the general character of the amendments desired is worth some attention.

They seem to fall under two general heads.

To Cure Defects

One group are intended to cure actual defects which experience has shown to exist in the Constitution as it is.

To Add New Principles

The second group would embody in the Constitution new principles of government.

The Twelfth Amendment, providing for the election of the President and the Vice-President, cured certain defects which appeared in the election of 1800–01, but still left certain ambiguities which led to serious difficulty in 1877, and which might lead to still more serious difficulties at any quadrennial period. Twenty amendments introduced in the 68th Congress are in the main designed to clear up these difficulties, and surely one of them (perhaps S. J. Res. 22) should be adopted, by the Congress, and by the states.

As might be expected, an opportunity afforded by remedial organic legislation of this kind would not be neglected by those who would like to secure at the same time the adoption of some entirely new norms of the structure of government; and such plans as the election of President and Vice-President by popular vote throughout the Union were proposed (e. g., H. J. Res. 185).

Nearly all the rest of the 100 proposed amendments would introduce some new feature into the Constitution, and the most of them would aggrandize the Congress at the expense of the other coördinate branches of the government, or at the expense of the states.

Many Added Powers for the Congress

The eight propositions to give the Congress power to legislate as to domestic relations, the twenty-six which would give like power with regard to child labor (one of which has been proposed to the states), the seven relating to income taxes are examples of new powers to be given the Congress, and thereby taken from the states.

In the last case the states would be given an added power, that of taxing securities of the federal government—thus making confusion worse confounded.

One Added Power for the President

Only one suggestion would give the President a new power —that to disapprove items in an appropriation bill.

None for the Courts

There has been one suggestion to give the Courts new jurisdiction. Added powers of legislation might tend to bring more cases before the Courts, but these would involve no new principles.

A Few to Restrict the Congress

Five propositions to limit the power of Congress to declare war, one to limit the powers of all governments, the federal included, to make appropriations of public funds for religious sectarian purposes, and two relating to the prohibition amendment, were also introduced.

Centralization

On the whole, the tendency towards centralization is apparent in most of the suggested amendments.

CHAPTER VII

ATTACKS ON THE FEDERAL EQUILIBRIUM BY LEGISLATION—CERTAIN MILITARY PENSIONS

Motives of Legislation

The motives of congressional legislation are many and curiously interwoven. There are party policies on which members divide as matters of course, to be sure. But the great mass of legislation is enacted with little or no reference to partisan policies. Some measures appeal to those who are interested in humane progress, like the pure food law, and other matters affecting public health or public morals. Some are more of a local character, like irrigation projects. Many perhaps, have an immediate bearing on the fortunes of individual members in their respective districts. Most members are apt to keep an eye on the next election.

With this last consideration in view it is interesting to notice two forms which activities leading to specific legislative measures are apt to take.

Some members are industrious in seeking out matters which will appeal to their particular constituents. In other cases considerable numbers of these constituents bring organized pressure to bear on their member to induce him to take up and actively follow the line of some measure in which they are especially interested. If the district is rather close, as is often the fact, it is dangerous to antagonize a considerable number of voters, especially if they are organized and energetic. Examples of such a situation are common enough, and some will be noted later.

A few lines of legislation may illustrate in operation some of these forces which influence legislation. Two are selected for

attention—certain pension legislation, and certain attempts towards federal control of education in the states. The first will be discussed in this chapter. This legislation tends to increase the power of the central government by building up a large and widely distributed class of federal beneficiaries with votes and influence.

CIVIL WAR PENSION ACTS

Beginning with 1861 acts of Congress providing for military pensions have been numerous. Few sessions have been without them—of late years they are incessant. The expenditures under these acts have grown enormously—the farther we get from the war the greater the annual appropriations.

Original Civil War Pensions

Hostilities ceased in 1865. In 1866 there were paid out in army and navy pensions upwards of fifteen millions. In the fiscal year 1923, sixty-eight years after Lee surrendered, the Civil War pension disbursements amounted to $238,924,931.94. In 1874 the total was $30,206,778.90. Then for several years, as might be expected, the expenditures diminished, until for the fiscal year ending June 30, 1878, the sum was $26,786,009.44. With no change in the policies adopted at the outset it is plain that in no long term of years the pension drain on the treasury would have become negligible, doubtless some small sum lingering for many years.

Report of the Commissioner of Pensions, Fiscal Year 1922–23, p. 9

But there was change, and radical change, in pension policies. Amounts paid to individuals have been increased and great numbers of new recipients have been added to the list. The total number of pensioners in 1878 (June 30) was 223,998. The total number in 1923 (June 30) was 433,203—nearly twice as many.

Ibid., p. 13.

Arrears Act of 1879

The first and in some ways the most curious of the successive measures is the Arrears Act, Jan. 25, 1879. It is curious in its origin, in the motive of its enactment, and in its results.

When the Civil War came to an end in 1865 the great Union Army of two million men was disbanded. These troops

who for four years had been marching and camping and engaged in skirmish and battle were quietly merged in the civilian population—the regiments disappeared as military units, the soldiers were on the farms, in the counting houses, in the shops, steadily at work earning a living and adding to the wealth of the nation. It was matter of general pride that our citizen soldiers, veterans of many battles, were once more citizens only. The republic seemed safe from its military organization with such defenders, and the disastrous history of Rome with its mercenary praetorian guards was not likely to recur in the new world. Now these men were soldiers, fighting for their country; now they were doing their part as citizens of that country.

Civil War Armies Merged in Civilian Population

There was a parallel in 1783 when the American revolutionary army was disbanded. There was an earlier parallel a century before in England when Cromwell's Ironsides were disbanded. Pepys in his diary (Nov. 8, 1663) records a comment by a thoughtful observer: "Of all the old army you cannot see a man begging about the streets; but what? you shall have this captain turned a shoemaker; the lieutenant, a baker; this, a brewer; that a haberdasher; this common soldier, a porter, and every man in his apron and frock, etc., as if they had never done anything else."

This was quite an accurate picture of the Union Army of 1865—indeed of the Confederate Army as well. It was only the maimed and otherwise disabled and the dependent families of the dead who needed aid from the national treasury or who asked for it—and many did not ask.

The volunteers had enlisted to perform a patriotic duty—they were not mercenaries—they served for the safety of the republic, not for their own profit—nearly all who returned from the war were hale and hearty and well able to earn a living, and there was great demand for industrious men in many walks of life. This was the common view of the situation throughout the country and it was held to be an inspiring

spectacle. Even the knowledge that the government had been obliged to resort to the draft quite early in the war and that recruiting had been stimulated by the offer of large bounties did not affect the general opinion on the subject. Deserting and bounty jumping and paid substitutes were forgotten with one accord. Those who had actually served were patriotic soldiers and all were now patriotic citizens.

Disability Pension Laws, 1861–2

Then again suitable provision had been made by law for the care of those who had incurred diasbilities from wounds or disease in the service and for similar care for the widows and young children of those who had lost their lives. Indeed so generous was the nation that this care was not limited to widows and children only, but included dependent mothers and orphan sisters—this latter quite new in our pension legislation. A general law had made reasonable conditions for the grant of pensions. The law, as has been said, contemplated pensions for those disabled in the service and for dependents of those who died in the service. That was all that was desired or expected; moreover there were many who incurred some injury while wearing the uniform but who were not disabled thereby for remunerative employment and who therefore did not care to ask for a pension. That seemed to belong only to those in actual need. So true was this that if in any way widows or orphaned children could find maintenance without seeking a pension they in very many cases refrained from what seemed a form of charity, only to be bestowed in case of need.

General Garfield's View as to the Future of Pensions, 1872

The chairman of the Committee on Appropriations of the House of Representatives in 1872 was General James A. Garfield, afterwards President of the United States. In speaking on the floor of the House (Dec. 12, 1872) he said: "It is thought by the Commissioner of Pensions that we have now reached the top, so far as the amount of expenditure is concerned; but he does not think that that top is a peak from which we will at once descend, but rather a plane upon which

we will go for perhaps several years with a substantial regularity of amount about the same as we are now paying per annum."

General Garfield could hardly anticipate the extraordinary legislation of a half a dozen year later.

This was the Arrears Act, as above noted (Jan. 25, 1879).

The Five Year Limit for Application

Previous legislation (Acts of 1868 and 1873) provided that pensions granted for death occurring, wounds received or disease contracted in the service since March 4, 1861, should commence at the date of the death or discharge of the person on whose account the pension accrued. On order to secure such pension, application should be duly filed within five years from the time at which the claim originated—unless in case of claims on behalf of insane persons or young children who might happen to have been without legal representatives. For them the time was extended.

These provisions were liberal and reasonable. The law was perfectly well known. Five years gave ample time within which to be sure that physical disability, if any, had resulted from war service. If application was not filed within that time it was entirely obvious that in practically all cases either there was no real war disability, or that there was no need or desire for a pension. If on later reconsideration, and very likely with rather vague evidence—and the passing years naturally made evidence more and more tenuous—an application should be granted, it was only fair to hold the intervening years as null, and that the pension if granted at all should date from filing the last evidence.

The Arrears Act, 1879

The Arrears Act, however, opened an entirely new field for pension claimants.

No Limit for Applications

It provided that all pensions under the general pension laws for casualties in service during the Civil War should commence with the death or discharge of the person on whose account the pension accrued. This was to apply to all pensions already granted or which should thereafter be granted.

Thus there was to be no limitation on the date of presenting the claim.

Obviously any one now claiming a pension for the first time if successful would not merely be entitled to a moderate monthly allowance, but also to a lump sum coming from arrears. These lump sums were by no means small. The Commissioner of Pensions in his report for 1881 showed that the average first payment to an army invalid was $953.62; to army widows, or dependents, $1,021,51; to navy invalids $771.42; to navy widows or dependents $790.32.

Here was an inducement to claim a pension which was quite new and attractive. It appealed to many who might have availed themselves of real injuries in the service to secure a pension but who for one reason or another had not cared to do so. It appealed to many former soldiers who were not overscrupulous and who were led to devise a non-existent injury in order to get a plump government check. It appealed powerfully to the whole army of crooks who saw it worth while to trump up evidence of service from the same motive.

Report of the Commissioner of Pensions, 1899

When the bill was pending its cost was estimated as an addition of perhaps $20,000,000 to the pension appropriation. A few months later Senators, appalled at the enormous cost it now appeared that they had helped saddle on the people, made searching inquiry as to the ground of such statements by proponents of the measure. The Chairman of the Senate Committee on pensions explained that it was true he had said such a sum (twenty millions) would be needed for arrears up to the date when he was speaking, but that "what would be required for those who hereafter made application could no more be calculated or estimated than one could calculate the number of birds that will fly through the air next year."

Cong. Record, 45th Cong., 3d Session, Pt. 3, 2050

That was not at all what Senators understood when the bill was under discussion. They thought they were informed

that about $20,000,000 would be the total cost under the act, and voted with that understanding.

A couple of months after the Arrears Act was passed, appropriations were made to provide for its cost, and at that time applications under it were limited to July 1, 1880.

What the actual cost has been it is even now impossible to estimate with accuracy. It is certain that there was feverish activity on the part of the army of claim agents and that a flood of applications poured into the office of the Commissioner of Pensions. The number of pensioners in 1878 was 223,998, and there had been a steady and natural diminution in the number for several years—the maximum had been 238,411 in 1873. In 1879 the number was 242,755; in 1880, 250,802; in 1881, 268,830. Thereafter, under the beneficient stimulus of the act of 1879 and of subsequent acts of similar nature there was a progressive increase of the number until in 1898 there were 745,822 Civil War soldiers and sailors on the pension roll, and in 1912 there were 304,373 widows and other dependents. The fiscal year ending June 30, 1923, fifty-eight years after the Civil War ended, showed 168,623 soldiers and sailors on the roll, and 264,580 widows and other dependents—a total of 433,207. General Garfield had supposed in 1872 that the payments on pension account estimated for 1873–4, upwards of thirty million dollars, would be the peak, after which there would be a progressive decrease. The pension payments for 1922–3 on Civil War pensions alone were $238,924,931.94 (Report of Commissioner of Pensions, 1922–3, p. 9). The total payments to Civil War pensioners from 1861 to 1923 have been $6,224,106,631.33.

Report of the Commissioner of Pensions, 1898, Table 1.

So far as the cost of the Arrears Act of 1879 is concerned, the Commissioner of Pensions in 1885, General J. C. Black, stated the expenditures on that account to have reached $179,400,000 at that time—and the cost has been going on since that time, entangled with many other sources of cost, but doubtless reaching many hundreds of millions.

Why the Arrears Act?

Was the Arrears Act of 1879 a spontaneous efflorescence of congressional generosity and thoughtful investigation? Hardly.

In a debate on the subject in the Senate (Feb. 6, 1882), Senator Hawley of Connecticut, a distinguished general officer on the Civil War, said: "I believe that the mass of the soldiers did not ask for this act; they did not expect it; they were as much surprised by it as anybody; they did not enlist with a chief view to the awards in money, nor would they unduly burden the country they offered their lives to save."

New York Tribune, March 10, 1879

The Secretary of the Treasury, John Sherman of Ohio, brother of General W. T. Sherman, said to the New York Tribune, "This bill was not demanded by the pensioners, but by the claim agents, and will work great inequality. Those whose disability was not developed for years after the war will get as much as those who suffered daily from wounds and sickness."

Claim Agents

Who were the claim agents to whom Secretary Sherman referred, and whom General Hawley evidently had in mind?

Perhaps the United States Commissioners of Pensions are as well informed as any, and we may refer to some of their statements on the subject.

It seems that originally these agents, acting for a claimant for a pension, in case of success were entitled to a fee of twenty-five dollars, deducted from the first payment and turned over by the Pension Bureau in cash. By an act of Congress of July 8, 1870, modified by an act of June 20, 1878, the fee was placed at a maximum of ten dollars, and was left to be collected by each pension attorney from his client. This change met with warm disapproval on the part of the gentlemen affected. We quote from the Pension Commissioner's Report, 1878: "The act has met the most determined opposition of a class of claim agents who, under the law as it previously stood, enjoyed large facilities for gathering up claims. The agents of this class, in support of this opposition, have

not hesitated to circulate through the country the statement that the law was inimical to the interests of the soldiers, both pensioners and claimants, and was intended to be so when passed; alleging that the reduction of the fee and the uncertainty of its collection would deter all reliable and responsible attorneys from aiding the soldier in the prosecution of his claims, and thus he would be prevented from securing his just rates.

* * * * * * * * * *

"The provisions which were modified by this act were contained in an act passed July 8, 1870, to protect pensioners and claimants from the oppressions and frauds which had therefore been extensively practiced upon them by unscrupulous claim agents. . . .

"While the provisions of that act served in some degree to restrain claim agents from demanding illegal and oppressive fees for their services, they presented an opportunity for other operations which have inflicted upon honest pension claimants far greater injury than that from which the act of July 8, 1870, intended to relieve them.

"A comparatively small number of professional claim agents and claim firms at Washington and some other points in the country, acted by the intervention of sub-agents, and by extensive advertising, employing for that purpose in some instances sheets issued in the form of periodical newspapers purporting to be published in the interest of the soldiers, the columns of which contained matter in which apparent anxiety for the soldier's welfare and appeals to their love of gain were cunningly intermingled, always representing the advertisers as in the enjoyment of special and peculiar facilities for the successful prosecution of claims, and usually adding the suggestion that no charge would be made unless a pension should be obtained.

* * * * * * * * * *

"Under this system these claim agents and their clients are strangers to each other; the agent having no personal knowledge in relation to the merit of the claim nor of the truthfulness of the testimony which he files in its support, is therefore, relieved of personal responsibility to the office as to the good faith of the claimant, and has no care except to secure a favorable consideration of the claim presented by him; and unmeritorious and fraudulent claims and false testimony have been flooded upon the office to such an extent that almost all claims are alike suspected, and, for the protection of the government, the office has been forced to the adoption of very stringent rules to govern the consideration of the cases, and the honest claimant is not unfrequently a sufferer thereby."

From the same report we learn that the Commissioner considered the legal system under which his bureau was obliged to operate wholly inadequate to prevent many improper and fraudulent claims being granted:

"Considering the extraordinary opportunities for the successful prosecution of fraudulent or unmerited claims which exist under the present system of adjudication, in connection with the fact that the Commissioner of Pensions has no authority to go out and hunt for fraud, but is limited by the statute to the investigation of such cases only as suspicion attached to in the usual routine of the office, the investigation of the last year, as well as those of the preceding year, furnish a very suggestive lesson. I am convinced that a great number of persons have been pensioned who had no just title, and that the number of that class is being constantly increased in the settlements which are now going on, and this must continue to be the case until some measure shall be adopted by which the truth of the parol testimony which is offered can be tested. No such test is possible under the present system."

The Commissioner further reported that in the inquiry which the law permitted him to carry on, of 798 cases in which a pension had already been allowed, 477—more than half—

were dropped, as not entitled to be on the roll; of 880 cases pending, which would probably have been admitted, 480 were rejected, and 68 were reduced in rate.

As to the claim agents, who were obviously implicated in these frauds, 77 were suspended from practice in the bureau, 45 were dropped from the roster of attorneys in the department (Interior), 52 were debarred and 24 were disbarred. Thirty-five persons were indicted for violations of the pension laws, and of these twenty-nine were convicted.

The cost of this investigation, which the Commissioner held to be so inadequate, was $38,235.95. The saving to the government was $402,096.95.

One wonders what would have resulted if the Commissioner had been given power and authority to investigate the entire pension roll.

The pension attorneys were extremely active in pressing the Arrears Act. The prospect of a diminishing scale of pension claims and payments obviously was not encouraging to the future of their particular industry. The Arrears Act of 1879

There was a long campaign of lobbying and propaganda in the interest of provision for arrears. Several journals were established by claim agents as the Commissioner indicated, for the ostensible purpose of providing the former soldiers with news and other reading matter of especial interest to them, with war stories and family pages, but all devoted to eager pension programs. One active claim agent organized a Committee of Pensioners, purporting to represent a Pensioners' Association, and their petition was incorporated in the Congressional Record (Jan. 9, 1879). This petition urged the Arrears Act "in behalf of honesty, justice and morality, and in upholding and maintaining the national faith which has been pledged to the payment of this just debt." Cong. Record, 45th Cong., 3d Session, Pt. I, 373

One of the most active of the claim agents in the arrears legislation, who had organized the committee of pensioners above noted, afterwards in an examination under oath ad- Glasson, p. 157 and note

mitted that his organizations of pensioners were casual and small affairs—his Washington committee was appointed at a meeting of 30 or 40 pensioners called by himself, of which he was chairman, and which after appointing the committee had no further meetings. Yet this ephemeral body had their memorial duty filed in the Senate, and the committee represented themselves as an "Executive Committee of the Pensioners' Association," as if they had all the Pensioners in the country back of them. Of the five Committee-men one was a clerk and one a messenger in the war office and one a clerk in the Pension Office.

This particular claim agent, chairman of the "Pensioners' Association," apparently was convinced that to his industrious efforts was due the passage of the Arrears Act, and in collaboration with members of his "Executive Committee" above noted and with other claim agents, had sent to many pensioners a memorial, signed by three of the five members of the "executive committee." This memorial explained that the chairman of the Pensioners' Association was entitled to the major credit for pressing on Congress the merits of the Arrears Bill and that the pensioners who profited by the act might very properly give him a fund of money as a testimonial. The Departments involved, however, called their employees sharply to account for such a transaction and all concerned were brought before a committee of the House of Representatives and remorselessly grilled. The enterprise, which might have yielded large profits, was nipped in the bud. The Committee report stigmatized those implicated as sharpers, and held that their timely exposure would "have the effect of breaking up similar attempts elsewhere by unprincipled scoundrels, who, while constantly prating of their love for their 'fellow soldiers' and 'comrades' generally manage to give a practical working to their affection which the victim is never likely to forget."

The whole report of the Committee makes interesting

reading (2d session, 45th Congress, 1878–9, vol. 2, Report No. 189).

Pension Propaganda Among the Old Soldiers

These pitiful creatures and their kind doubtless had little weight with members of Congress. A more effective method of the claim agents, however, was extensive propaganda among the old soldiers. The journals which they had established contained urgent articles pointing out the merits of the arrears measure and especially what it would mean to the recipients. This succeeded in waking up possible claimants through the country, and they in turn used every effort to induce their members of Congress to act favorably. Thus gradually members were induced to vote for the bill—which had failed in the 43d and in the 44th Congress, but which passed in the 45th. It is probably fair to say that two motives prevailed with those who voted for the bill—a sincere and kindly approval of its principle, and the natural desire to please the old soldiers among their constituents. The claim agents' long and active campaign among the soldiers must have had a large effect on Congress, in this indirect way appealing to both motives.

The Grand Army Takes a Hand

These journals of the claim agents may well be studied to illumine methods and results (Glasson, p. 182 sqq.)

Shortly after the arrears bill was passed the Grand Army of the Republic appointed a Committee to investigate delays in making pension payments. After that the Committee on Pensions was a regular part of the Grand Army organization, and brought to bear on Congress all the force of an organized body with members numerous in all northern states.

Personal Attacks on Opponents of Pensions Measures

Here we have a definite body of influence directed to congressional legislation. If any member of either House ventured to doubt the wisdom or justice of any proposed increase of pensions, the wrath of the newspaper organs of the claim agents was vociferous. It was urged that the old soldiers must organize and "vote against any candidate for political honors who is not pledged to their cause" (Glasson, p. 183).

If any commissioner of pensions exerted himself to keep out the flood of fraudulent claims, he was vilified and attacked by every method (e. g. the Testimony of the Select Committee on Pensions, Bounty and Back Pay, 46th Cong., Third Session, House Reports, vol. 2, no. 387—pp. 418–9, etc.) Some were forced out of office by the political pressure brought against them.

If any newspaper discussed the pension legislation adversely, it was promptly brought to book. One of the Washington organs of the pension attorneys in 1883 urged the ex-soldiers "to withdraw their patronage from every newspaper which is opposed to pensions" (Glasson, p. 183). Under the heading "The Hue and Cry which the Newspaper Bloodhounds are raising against our Ex-Soldiers," this same paper reprinted editorials adverse to the pension system from the *New York Tribune*, the *New York Sun*, the *Cincinnati Commercial*, the *St. Louis Globe-Democrat*, the *Chicago Tribune*, and other well known reputable newspapers (Ibid. 183).

General C. F. Adams on the Campaign Methods

Mr. Charles Francis Adams, Bt. Brigadier General in the Union Army during the Civil War, writing in the *World's Work*, Dec., 1911, said: "It is safe to say that, if the exigencies of legislation called for it, every one of the 25,000 attorneys practicing before the Pension Bureau could be depended on for at least one telegram to some member of Congress. It is no exaggeration, therefore, to assert that, at a single indication amounting merely to a warning from the sentinel 'vulture,' from twenty to thirty thousand telegrams would in a single day be poured in upon Congress. The pressure also could be directed exactly at the points where pressure was most necessary or desirable. Outside of Congressional circles few have any idea of the influences which can be thus brought to bear. It is to be remembered also that, on the other side, nothing is heard. What is everyone's business is proverbially no one's business, and any member of Congress, whether in Senate or House, questioned on the point, would state that

to one letter or message of protest against some 'blanket' act involving the expenditure of tens of millions, he will receive at least a hundred urgent messages demanding its passage. If, moreover, any member of Congress raises his voice against such a measure, he becomes at once the recipient of letters of remonstrance, some indignant, others abusive and threatening. Most rarely, however, does he get a letter of commendation or sympathy. The logical result follows. Members of Congress are somewhat exceptionally human."

The Grand Army Encampment, 1911

In the Sessions of the Fifty-fifth Annual Encampment of the Grand Army of the Republic (1911) a member from the floor said: "The majority of the House of Representatives . . . is made up of young Democrats who have shouldered out old Republicans upon the plea that they have not been doing enough for the veterans. . . . These men have got to go back to their constituents and give an account of their stewardship to these veterans who have elected them to office. They admit to me that they have been elected by the votes of veterans and their sons and sons-in-law. . . . For example, a Congressman in Indiana running in a natural Republican district, or nearly so, credits the veterans with five thousand to eight thousand majority."

General Adams Again

General Charles Francis Adams writes (*World's Work*, Dec., 1911, vol. 23, pp. 327–8): "It may safely be asserted that any member of Congress representing a district north of the Potomac, who dares to criticize, much less to challenge a measure involving an increase in the appropriation for pension payments, practically takes his political life in his hand.

"Massachusetts furnishes an example. Under the last census fourteen congressional districts were apportioned to Massachusetts. The average number of pensioners in each district of Massachusetts is just 2,700. At the election in November, 1910, in which the members of the present Congress (62d) were chosen, the vote in Massachusetts, Republican and Democratic, was almost exactly equal, 203,136

Republican, 203,624 Democratic. In five districts, casting an aggregate of 182,000 votes, the total of the pluralities of the successful candidates, one way or the other, amounted to only 2,806. In those districts there were probably 18,000 pensioners. The average plurality in a district was 450. Such figures speak for themselves."

Balance of Power in Congressional Districts

Indeed the situation has been clear enough since 1879. In many northern districts—in almost any close district—it is supposed that the Civil War soldier vote holds the balance of power, and that that vote will be cast nearly solidly in accordance with willingness of a candidate to vote for higher and still higher pensions. Few candidates dare to oppose such a vote.

Objections to Increase of Pensions

Occasionally a member of Congress has spoken out frankly in debate. Occasionally a President of the United States or a prominent public man, of civil or military record, has spoken. No one has opposed pensions for those who were injured in service, for their dependents, or even for soldiers whose old age made them dependent. Objection has been made to loose legislation which has opened the door of the treasury to the unworthy, to the constantly mounting costs, to pensioning the able-bodied and those financially independent. Objection has been made to the obvious political purposes of such appropriations—thus making them virtually an election bribe. Objection has been made to pensioning widows who in fact as young girls married old men, obviously as an investment.

Old Soldiers as Matrimonial Investments

Senator Gallinger (N. H.) said: "Some ten years ago I offered an amendment, I think to the pension appropriation bill, that I thought was in the interest of the old soldiers and in the interest of the treasury of the United States. It was to cut off from pensions the young women who are marrying the old soldiers fifty years after the war. We are going along the same road today. We have on the pension rolls now several thousand widows of soldiers of the war of 1812.

"If we continue to pension that class of widows we will have on the pension roll fifty or sixty years from now widows who had no relation whatever to the war. It seems to me that we ought to purge the pension roll to that extent if we possibly can."

Thus the Senator from New Hampshire.

Act of May 9, 1900 Sec. 4702 Rev. Stat. of the U. S.

In fact a widow is pensioned if she was married to her soldier or sailor before June 27, 1905 (forty years after the war ended) without regard to the cause of his death; or whenever she married him if she can trace his death to a cause originating in his war services.

Comment of a Texas Member

In the debate in the House of Representatives (Committee of the Whole) on the Sherwood Bill (the so-called dollar a day bill, which became a law May 1, 1912), Mr. Dies of Texas, said: "During the last session of the 61st Congress while the Republicans were in power a pension measure known as the Sulloway Bill passed this house. Fortunately it died in the Senate. We are now confronted with the Sherwood Pension Bill, brought in as a Democratic measure. I do not wish to discuss the comparative merits of the two bills. To my mind each of them is a vicious and unprovoked assault on the Treasury. I understand perfectly well that there has been a rivalry between the Democratic and Republican parties ever since the Civil War as to which could and would give the most to the Union soldiers in the shape of pensions. Mr. Chairman, the whole scheme is wrong. *The people should support the Government, not the Government the people.*"

62d Congress, 2d Session, p. 148 sqq.

Comment of a New Jersey Member

In discussing that Sulloway Bill in the 61st Congress Mr. William Hughes of New Jersey said:

"I want to say this here and now—although I realize the effect of my vote on this question—that fifty million dollars a year is too big a price for the country to pay to bring me back to Congress."

The Sulloway Bill was estimated by the Commissioner

The Sulloway Bill, 1909–11

of Pensions to cost $140,000,000,000 in ten years—adding about $45,000,000 the first year.

At the Annual Encampment of the Grand Army of the Republic in the next following August (1911) the pension resolution adopted included the following:

"*Resolved:* That it is the sense of this Forty-fifth National Encampment of the Grand Army, that the time has come today, fifty years after the outbreak of the great Civil War, to deal generously with the survivors of that war."

At that time (Fiscal year ending June 30, 1911) the total disbursements for pensions were $159,842,287.41. There were 892,098 persons on the rolls.

Congressional Record, 62d Congress, 2d Sess., p. 127

The resolution then went on to urge the principles of the Sulloway Bill. It was pointed out on the floor of the House of Representatives that the presiding officer put the motion on this resolution without allowing debate and without calling for negative votes. The minutes of the Encampment (p. 259) certainly show an odd parliamentary situation.

Comment of General A. B. Nettleton

In the debate on the Sherwood Bill (Ibid., p. 127) a member quoted a letter from Gen. A. B. Nettleton, a distinguished officer of the Union Army: "The passage of the Sulloway Bill in the House has already done more to injure and discredit the whole pension business with the people than any other public act for a quarter of a century." Perhaps the General had in mind the Arrears Act of 1879.

Comment of Gen. Bragg

In discussing a pension bill pending in 1887 in the House of Representatives, another well known Civil War veteran, Gen. Bragg of Wisconsin, said: "The bill should be entitled 'A bill to pension the rubbish of the Army of the United States, and to revive the business of claim agents in the city of Washington.'" (Cong. Rec., Vol. 18, p. 173.)

Pension Act of 1890—Disability However Incurred

The act of June 27, 1890, Sec. 2, provides that persons who served 90 days or more in the army or navy during the Civil War and for any reason, whether resulting from injuries in the service or not, are incapacitated for earning a living by

manual labor, provided only that such incapacity is not the result of their own vicious habits, shall be entitled to a pension. Under this act "A man might be in receipt of a comfortable or handsome income from his services as a skilled worker, salesman, clerk, lawyer, physician, public official, business man, or banker, without thereby being ineligible for a pension." Glasson, p. 236

Under this act, and indeed under previous interpretations of the law relating to disability, pensions were given to a judge on the bench, to a member of Congress, to a deputy Commissioner of Pensions. These, be it noted, were not service pensions but pensions for physical disability. World's Work, vol. 21, pp. 13734–13737

In vetoing a pension bill in 1887, President Cleveland said: "In the execution of this proposed law under any interpretation a wide field of inquiry would be opened for the establishment of facts largely within the knowledge of claimants alone, and there can be no doubt that the race after pensions offered by this bill would not only stimulate weakness and pretended incapacity for labor, but put a further premium on dishonesty and mendacity." President Cleveland and Pensions

The next year, 1888, Mr. Cleveland failed of reëlection. The bitter animosity caused by his pension vetoes no doubt aided materially in his defeat.

The act of 1890, under the Republican administration, above noted, introduced two new and far reaching principles —pensioning former soldiers incapacitated for manual labor practically without regard to the cause, and pensioning widows without regard to the cause of the husband's death. The results were obvious. The cost was enormous—from 1890 to 1907, when a new law was substituted, more than a thousand million dollars were expended in pensions under the act of 1890 alone. New Pension Principles in the Act of 1890

The disbursements in the year 1889–90 were $109,620,232.52. The next year they were upwards of $122,000,000, the next year $144,000,000, and the next $161,000,000. The Costs

There was then a falling off to $143,000,000, and thereafter the annual payments were nearly that amount until the act of 1907 was passed.

These vast sums were paid out of the Treasury not merely to old soldiers—in other words to those who had been soldiers not less than three months—but to many who were in no sort of need, and also to widows, who, as Senator Gallinger said, "were young women who are marrying the old soldiers fifty years after the war."

Compulsion on Legislators

The political pressure to enact this sort of legislation had become apparently irresistible. The appetite for stipends from the federal Treasury had grown with the years since 1879. Pensions for disabilities incurred in the service, then for disabilities incurred at any time, then for no disability at all—a service pension. That was the orderly sequence. The pension agents, their newspaper organs, the organized Civil War soldiers meeting annually and with a pension committee reporting at each meeting, a constituency of soldier voters in most congressional districts enough to decide the election—these were the forces compelling Congress to act—a compulsion more definite and effective with the years.

Journal of the G. A. R. Encampment, 1887, pp. 231–2

At the National Encampment of the Grand Army in 1887 a members said: "I may go into the rural districts, and let Comrade ——— go with me and tramp up and down the Wabash Valley, taking the soldiers as they come, and nine out of every ten, Democrat and Republican, are in favor of a service pension bill. We are here to legislate for that. Let me give you a little piece of history. The gallant General Hovey of Indiana, Captain White of Fort Wayne, and myself represent three districts in Indiana, and in each of those districts the majority against us is from twelve to fifteen hundred. We held a council of war. We declared in favor of a universal pension. Our opponents were foolish enough to fall into the trap and oppose it. Hovey carried his district by fourteen hundred majority. Captain White carried his by

over twelve hundred, and I carried mine by twelve hundred and fifty."

These methods of securing votes at the expense of the taxpayers, used by both parties, became a matter of course.

Pension Act of 1907

In 1907 the age pension principle was adopted—any one who had served at least 90 days in the army or navy during the Civil War, had been honorably discharged, and had reached the age of 62 years, thereby became entitled to a pension, increasing with increasing age, up to 75. The age of 62 was created as in itself "a permanent specific disability within the meaning of the pension laws."

Age Takes the Place of Disability

Pension Act of 1912—Length of Service and Age

In 1912, the Sherwood Bill as modified in the Senate became a law, whereby pensioners who reached the age of 62 were graded according to the length of service—for ninety days thirteen dollars a month, and so on increasing to sixteen dollars a month. Similar and increased grades of pension were made to apply to subsequent ages, 66 years, 70 years and 75 years or over. These rates were increased in 1918 and in 1920—the last making the minimum in each case $50 a month. In 1920 also increased benefits accrued to widows and other dependents and to nurses.

The Costs. Report of the Commissioner of Pensions, Fiscal Year, 1922–3, p. 9

The pension payments in 1906–07 were $141,000,000. The next year they were $155,000,000, and the next $164,000,000. Under the act of 1912 they rose from $159,000,000 to $176,000,000. The payments to Civil War pensioners in 1919, the year after the World War armistice, were $212,000,000, and in 1920 were $202,000,000. Under the influence of the act of that year they became $246,000,000, in 1922 were $236,000,000 and for the year ending June 30, 1923 were $238,924,931.94.

Special Pension Acts

But these general laws which have provided so lavishly for pensioners are not all. Every year Congress passes special acts for the relief, as it is put, of a considerable number of individuals. These acts provide pensions for persons who, for a variety of reasons cannot conform to the conditions of the

general laws, or increase pension rating for those already pensioned. The following table (Report of the Commissioner of Pensions for the Fiscal Year ending June 30, 1923, p. 11, Exhibit 9) is instructive.

EXHIBIT 9. NUMBER OF PENSIONS GRANTED BY SPECIAL ACTS EACH CONGRESS SINCE MARCH 4, 1861

37th (1861–63)	12	53d (1893–95)	119
38th (1863–65)	27	54th (1895–97)	378
39th (1865–67)	138	55th (1897–99)	694
40th (1867–69)	275	56th (1899–1901)	1,391
41st (1869–71)	85	57th (1901–03)	2,171
42d (1871–73)	167	58th (1903–05)	3,355
43d (1873–75)	182	59th (1905–07)	6,030
44th (1875–77)	98	60th (1907–09)	6,600
45th (1877–79)	230	61st (1909–11)	9,649
46th (1879–81)	96	62d (1911–13)	6,350
47th (1881–83)	216	63d (1913–15)	5,061
48th (1883–85)	508	64th (1915–17)	5,885
49th (1885–87)	856	65th (1917–19)	3,641
50th (1887–89)	1,015	66th (1919–21)	2,200
51st (1889–91)	1,388	67th (1921–23)	2,319
52d (1891–93)	217		61,443

In other words special pension action has been taken by Congress in more than 60,000 cases—adding to the rolls those who under the very liberal pension acts could not qualify, and in very many cases increasing the pensions of those already on the rolls. Who are these persons?

Many of them have had their claim denied by the Pension Bureau. President Cleveland vetoed 233 special pension acts. One hundred seventy-five the President held to be a grant of
Mason 88 pension on the ground of injuries not received in the line of military duty. A few cases may be detailed by way of illustration.

"This claimant was enrolled as a substitute on the 25th of March, 1865; he was admitted to a post hospital in Indianapolis on the 3d day of April, 1865, with the measles; was removed to the city general hospital in Indianapolis, on the 5th day of May, 1865; was returned to duty May 8, 1865, and was mustered out with a detachment of unassigned men on the 11th day of May, 1865. Veto Message of President Cleveland, June 3, 1886 Sen. Mis. Doc. 2d Sess., 48th Cong. 53, p. 478

"This was the military record of this soldier, who remained in the Army one month and seventeen days, having entered it as a substitute at a time when high bounties were paid.

"Fifteen years after this brilliant service and this terrific encounter with the measles, and on the 28th day of June, 1880, the claimant discovered that his attack of the measles had some relation to his Army enrollment, and that this disease 'had settled in his eyes, also affecting his spinal column.'

"The claim was rejected by the Pension Bureau, and I have no doubt of the correctness of its determination."

"This claimant was enrolled as a private in a New Hampshire regiment Aug. 23, 1864, but on the organization of his company on the 12th day of September, 1864, he was discharged on account of a fracture of his leg, which happened on the 11th day of September, 1864. Ibid., p. 494

"It appears that before the organization of the company to which he was attached, and on the 10th day of September, he obtained permission to leave the place of rendezvous for the purpose of visiting his family, and was to return the next day. At a very early hour in the morning, either while preparing to return or actually on his way, he fell into a new cellar and broke his leg. It is said that the leg fractured is shorter than the other.

"His claim for pension was rejected in December, 1864, by the Pension Bureau, and its action was affirmed in 1871, on the ground that the injury was received while the claimant was on an individual furlough, and therefore not in the line of duty.

"Considering the fact that neither his regiment nor his company had at the time of his accident been organized, and that he was in no sense in the military service of the United States, and that his injury was received while on a visit, and not in the performance of duty, I can see no pretext for allowing a pension in this case."

Ibid., p. 504

"It is proposed by this bill to grant a pension to the beneficiary named as the widow of ———.

"This man was mustered into the service October 26, 1861. He never did a day's service so far as his name appears, and the muster-out roll of his company reports him as having deserted at Camp Cameron, Pennsylvania, November 14, 1861.

"He visited his family about the 1st day of December, 1861, and was found December 30, 1861, drowned in a canal about six miles from his home.

"Those who prosecute claims for pensions have grown very bold when cases of this description are presented for consideration."

Ibid., p. 517

"The beneficiary named in this bill is the widow of ———, who enlisted February 8, 1865, was promoted to first lieutenant March 13, 1865, and was discharged May 22, 1865, having tendered his resignation, as it is stated, on the ground of incompetence. His tender of resignation is endorsed by the commanding officer of his regiment as follows: 'This man is wholly unfit for an officer.'

* * * * * * * * * *

"In 1880, fifteen years after his discharge, he applied for a pension, alleging that he contracted a disease of the liver while in the service.

"His attending physician, before enlistment, stated that as early as 1854 the claimant was affected with dyspepsia and functional disease of the liver.

* * * * * * * * * *

"The soldier died in 1881, sixteen years after his discharge, and his widow filed her claim for pension in 1882, alleging that the death of her husband was caused by a disease of the liver contracted in the service.

"Her claim was rejected in 1883 upon the ground that the disease of which her husband died existed prior to his enlistment."

In another case a former soldier was accidentally shot and killed by a neighbor who was attempting to shoot an owl. The widow claimed a pension. Mason, pp. 91–2

Some other vetoes were based on a variety of cogent reasons. One bill "was the claim of a widow who proved not to be a widow; one was the claim of a woman who had had a pension as the widow of a soldier killed in the war, but who had lost her pension by remarrying, and who now wished it renewed, although she was still married and was living with her husband. Five granted pensions to men who had deserted from the army." Odd Cases, Mason, pp. 88–9

It is obvious that Committees of Congress cannot give careful study to the innumerable cases of applicants for special pension favors which come up every year. So far as action is taken these bills are rushed through in the mass. They can hardly have any apparent justification in many cases but as special favors to constituents. Some beneficiaries have had only a very remote relationship to any bona fide military service. Some of these bills have granted pensions to those who are flagrantly undeserving. Deserters and men dishonorably discharged from the army for other grave offenses, have had their records changed so as to entitle them to pensions. Evidence of these cases seems to have consisted often in the affidavits of those in interest. Methods of Such Special Legislation

World's Work, Vol. XXI, p. 14159 sqq.

The pension roll should be a roll of honor.

It would seem quite reasonable that the Pension Bureau should investigate every case of an applicant for a pension, and should lay all the facts in each case before the Commit- A Roll of Honor

tees of Congress on application. All the facts should be of record when action is taken.

Comment by a Member from Illinois

In speaking on the Pension Bill in the 51st Congress, Representative Lyndon Evans of Illinois said: "We ought to get together here as American representatives and consider this whole question, codify all the laws, put them together and make them consistent; make them so that the people of this country will feel that they are not being defrauded, as many of them do today; make the inquiry into fraud so searching that we will respect this department; restore the pension roll as a roll of honor; make these laws consistent; and when this bill reaches the stage when it can be amended, I propose to move that this bill and the entire pension subject be submitted to a Commission, who will be instructed to report at this session one codified, consistent statute on the subject."

Politics

Of course, as has been said, politics has played a large part in pension legislation. The "soldier vote" has been sought by both parties, and in turn the soldier vote, organized and unorganized, has been brought to bear on members of Congress to secure favorable legislation. Good nature, sympathy for indigence, patriotic emotion, fear of defeat, have affected members of Congress in varying proportion—and the treasury has paid the bills. "You can get anyone to vote for any pension bill you want in any legislature in the North, because the members do not dare to vote against it," was said on the floor of the House of Representatives in 1911.

Congressional Record, 62d Cong., 2d Sess., p. 127

Ibid., p. 238

"In 1888, 1889, 1891, 1892, 1895 and on 1900, laws were passed providing for removal of charges of desertion in certain cases, the ultimate purpose of which was to give a pension to soldiers with doubtful or discreditable records," said another member.

Pension Speeches in Congress

The speeches in favor of the various pension measures are often of the same type. They consist of flowery glorifications of the valor and sufferings and patriotism of the soldiers and of the importance of the victory.

"They went into the contest because they loved the starry flag, believed in our glorious Union, and were willing to sacrifice everything for its preservation." This was doubtless true of the great mass of the volunteers of 1861, and of many later volunteers. Whether it applied to all the drafted men, to all the substitutes, to all who enlisted with the large bounties of the later war years, and especially to those who took these bounties, deserted at the first opportunity, and enlisted again, sometimes more than once, for further bounties, and continued in one way or another to foist themselves on the pension roll, is perhaps open to question. There are such cases. Ibid., p. 160

One eloquent member of Congress speaking in the House June 25, 1910, on a pension bill then pending, said: "There is no gift in the Republic too good to give to the men who saved the Republic. Gratitude, Mr. Chairman, is the fairest flower that sheds its perfume in the human heart. . . . This is a rich country, this is the land of liberty, this is the grand Republic. I cannot bring my ideas of justice and gratitude down to the low level of mere dollars. I place my views on higher grounds, I speak for patriotism, the noblest sentiment that animates the soul of man."

On January 10, 1911, speaking on the Sulloway Pension Bill, the same Congressman said: "Mr. Speaker, . . . I am now, ever have been, and always expect to be the friend of the men who saved our Country in its greatest hour of peril. We owe them a debt we can never pay. They are entitled to our everlasting gratitude, and gratitude is the fairest flower that sheds its perfume in the human heart. Let us be grateful lest we forget. . . . This is a rich country; this is the land of liberty; this is the grand Republic; and it is all so, to a large extent, on account of what the gallant men who marched from the North did in the great struggle for the Union. . . . I cannot bring my ideas in favor of this bill down to the level of mere dollars and cents. I place my

vote on higher ground. I want the bill to pass for patriotism —the noblest sentiment that animates the soul of man."

On December 12, 1911, speaking on the Sherwood Pension Bill in the House, the same gentleman said: "Mr. Chairman, I shall vote for Gen. Sherwood's Bill. I want to do justice to the soldiers who saved the Union. I want to reward them while they live. . . . This is a rich country, this is the land of liberty; this is the grand Republic; and it is all so, to a large extent, on account of what the gallant men who marched from the North did in the great struggle for the Union. . . . I cannot bring my ideas regarding this bill down to the level of mere dollars and cents, I place my vote for it on higher ground. I want this bill to pass for patriotism—the noblest sentiment that animates the soul of man. . . .

"I am now, ever have been, and always expect to be the friend of the men who saved our country in the greatest hour of its peril. We owe tham a debt we can never pay. They are entitled to our everlasting gratitude—and gratitude is the fairest flower that sheds its perfume in the human heart. Let us be grateful lest we forget."

Indeed the debates on the various pension bills afford numerous instances of oratory of this nature—hardly intended to affect votes in either House of Congress, but perhaps calculated to secure the vote of former soldiers at the next election.

Comment of a Member from California, Ibid., p. 161

An example of another class of oratory in Congress, rather refreshing by way of contrast, is that of Representative William Kent of California on the Sherwood Bill: "We are not here to act on our own generous impulses with money not our own. We are here to administer trust funds. We cannot alleviate all the want in our country. . . . It seems to me that in this world of but relative justice we have been generous to our veterans. They have had more consideration than any other class of people. We cannot pay them for being patriotic, for patriotism is not purchasable. We have done

much more to alleviate their needs than we have done for others equally worthy."

Mr. Kent's simple common sense might well be taken to heart by any Congress—or at all events by every Congressman, who cares more for his duty as representative of the nation than he does for his own reëlection. But there is much human nature in members of Congress.

Theory of an Indiana Member

In that same debate on the Sherwood Bill a member from Indiana made a characteristic speech—lauding the heroes—urging that they cannot be paid enough—and then adding a peculiarly whimsical consideration. They had been paid, he said, in greenbacks, paper currency had been greatly depreciated during the war. Therefore the soldiers should all have additional pay sufficient to equal the gold value which they should have had—adding some $198,000,000 to the appropriation, should the ingenious gentleman have his way. "If the Union soldiers had been paid in money worth a hundred cents on a dollar," he said, "they would have received in excess of what was paid them the sum of $51,061,222. In other words this was the depreciation on their monthly pay, and has been withheld from them for 48 years. The interest on this vast sum of money, not compounded, but simple interest at 6 per cent, would be $147,056,319; now add this to the principal and you have the sum of $198,117,541 honestly due, and as a matter of justice and right should be paid. This vast sum of money, together with what could be saved by discontinuing the seventeen unnecessary pension agencies, and by what could be saved by making examinations unnecessary, as this bill will do, would go a long way towards paying pensions for some time to come."

Cong. Rec., 62d Cong., 2d Sess., vol. 48, Pt. I, p. 176 sqq.

It is difficult to see what one would not believe who could believe such a doctrine.

Frauds

From the first the pension legislation seems to have made fraud easy and its detection difficult. As far back as 1880 the Commissioner of Pensions complained that the law afforded

Sen. Doc., 46th Cong., 2d Sess., vol. 10, p. 428

"an open door to the treasury." The evidence substantiating a claim has been in the main *ex parte*, based largely on the affidavit of the claimant. As the years since the Civil War pass on witnesses to facts asserted are gone. Alleged witnesses have been rather easy to secure. Medical examinations, during the years when physical disability was a condition precedent. were not invariably reliable. The pension bureau was enabled to examine the validity of claims only so far as there appeared some ground of suspicion in the record. In short for many years there has been wide spread an opinion that quite aside from the looseness of legislation many have been in receipt of pensions who have had no legal right to receive them.

"The Pension Carnival"

In 1910–11 a well known and reputable magazine in New York published a series of articles on "The Pension Carnival." In the course of these articles specific cases were enumerated, with names and dates. In 1893, President Cleveland appointed as Commissioner of Pensions a veteran of high character and marked executive ability, Judge William Lochren, of Minnesota. "Lochren was astonished to find frauds everywhere. In Norfolk, Va., New Mexico, Iowa, Louisiana, and Northern New York, he unearthed wholesale crimes against the treasury. Whole boards of examiners had been bribed. Whole communities had been so thoroughly demoralized by the reckless generosity of the Grand Army administration that public sympathy was violently against the special examiners sent out to unearth frauds, and attempts were made to mob them."

The World's Work, vol. 21, p. 13736

Ibid., p. 13737

Lochren could examine only a small proportion of the accepted pension list, but he found cause to drop 2,266 names and to reduce the ratings of 3,343 other cases. In the first year of Lochren's administration under Mr. Cleveland, the pension disbursements fell from $161,734,373 to $143,950,-702.

The Editor of the magazine above noted said (July, 1911,

p. 14549): "The country is now beginning to understand, not in a vague way, but as a definite demonstrated fact, that, while most of this money goes to the well deserving, a good many millions are falling into the hands of fake veterans, bounty jumpers, impersonators, camp-followers, deserters, malingerers and bogus widows.

No Libel Suits

"The series of articles . . . proved this beyond any possibility of denial. In these articles were cited scores of cases with full particulars, including names and dates, in some cases photographs, in which the Government had been, or was being, defrauded. Not a single allegation in the cases exposed by the *World's Work* has been disproved. The truth of not one of the statements has been denied either by the Pension Bureau or by the culprit named. . . . In dozens of cases the charges made were libelous in the highest degree. Not a single suit, not even a threat of a suit civil or criminal has been brought against the author or the magazine."

The "Checking Up" of Pensions

In that year, apparently as a result of the publicity given to the infelicities of the pension system, the Pension Bureau proceeded to "check up" the roll of pensioners. The method was to interview the pensioners and to examine their certificates—thus obviously not seeking any evidence but that already on record in securing a pension.

In the Commissioner's Report for 1910–11 (p. 162) it was said: "Up to date 47,181 pensioners have been seen and questioned as to their identity, and their certificates examined; as a result of this checking up five widows' names have been dropped from the rolls for violation of the Act of Aug. 7, 1882, one on the ground that she is not the legal widow of the soldier, and the names of two invalid pensioners because it was shown that they deserted from the service and received bounties for reënlistment." It was also reported that eighteen more would probably be dropped and that two bogus pension examiners had been found.

One wonders what would have been found had there been a real investigation.

A Kentuckian as Commissioner

President McKinley appointed as Commissioners of Pensions Mr. H. Clay Evans, of Kentucky, who had been governor of that state and also member of Congress. He carried on for several years a vigorous campaign against pension crookedness. A few quotations from some of his annual reports may be worth while. It should be noted that the act of June 7, 1888, repealed all limitations as to the date of filing a pension application on behalf of a deceased soldier and dated the pension from the husband's decease.

From the report for the year ending June 30, 1899:

Widows

"The result of the act of June 7, 1888, is to grant, in many cases, large amounts of pension money to former widows of soldiers who have long since remarried and whose husbands are practically receiving the benefit of the pension, although they have never rendered any service. The records of national cemeteries have been brought into use for the purpose of determining the names and service of those buried there. Women are then hunted up who are induced to execute applications for pension on account of the service and death of these soldiers.

"These women become pliant tools in the hands of the operators. A prima facie case is made out by means of 'stock witnesses'; and the originator of the fraud pockets the amount of the first payment, leaving the fraudulent claimant to reap the benefit of future payments. Great difficulty is often experienced by this bureau in disproving a marriage or marriages alleged to have occurred 30 or 40 years ago."

From the Report for the year ending June 30, 1900:

"No pension legislation that has ever been enacted has been so fruitful of fraudulent practices as the act of June 7, 1888.

"The operation of the gang of swindlers on claims based on services in the United States colored troops, referred to in the

report of the chief of the law division, were based on the provisions of this act, and the field for similar attempts at fraud is not confined to this class of cases. . . . A law that encourages crime and holds out inducements for the filing of fraudulent claims should not have a place on our statute books."

The Commissioner recommended the repeal of the act and that pension payment to widows should date from the filing of the application. It was the arrears which were so tempting to crooks.

The chief of the law division in his report included with that of Commissioner Evans detailed the breaking up of a gang of swindlers at Nashville, Tennessee. Of 234 claims investigated it was proved that in 217 the claimant never performed the service, or that forged, false and fabricated papers had been filed. Of the claim agents involved, 27 were tried and all either confessed or were convicted.

During that year, 387 pension attorneys were disqualified for one reason or another—mostly disgraceful.

In the Report for 1901 the Commissioner illustrated the frauds which his staff were unearthing by a typical case.

"The soldier died in the service Jan. 27, 1864. On Feb. 3, 1887, 23 years after his death, his widow filed a claim for a pension, alleging marriage to him by a customary ceremony. Proof was submitted tending to show the fact of alleged marriage and their continuous cohabitation as man and wife up to the date of his enlistment. She was pensioned as his widow Oct. 5, 1887, at $8 per month from Jan. 28, 1864, and at $12 per month from March 19, 1886. The arrears payment in this case amounted to $2,352; after drawing $4000, the pensioner admits that she was never married to the soldier."

See also Report of Commissioner of Pensions, Aug. 31, 1898, pp. 15–16

Commissioners who tried to protect the treasury against such impositions became very unpopular. That those benefited by loose administration should disapprove of Commissioners who made their booty precarious was of course to be

Some Commissioners Unpopular

expected. But officials who were the enemies only of graft and fraud were violently assailed as enemies of the soldiers. In fact they were the best friends of the real soldiers. Their efforts were towards making the pension roll a roll of honor—which it cannot be when stained by sordid greed and dishonesty.

Resumé

The acts of Congress in the matter of Civil War pensions are very numerous. Many cover mere matters of detail. The salient acts, discussed in the preceding pages, are, some half a dozen relating to soldiers and sailors, and about the like number relating to widows and other dependents.

I. *Soldiers and Sailors*

The Act of July 14, 1862; Disability Incurred in the Service

The general act of 1862 provided pensions for those disabled by wounds or disease incurred in the line of duty—disabled, that is, for self-support by manual labor. For nearly thirty years the principle of this act, disability incurred in the service, was the sole ground for granting a pension. The pension, when granted, dated from the filing of the application.

Act of June 27, 1890; Disability However Incurred

The act of 1890 extended the pensionable status to a civil war soldier or sailor disabled at any time and from any cause.

A New Principle of Pensions

This was a novel procedure in pension legislation. Theretofore it had been assumed that the state owed to its defenders a support only in case they became incapacitated for self-support by the exigencies of service. Others, who returned to civil life sound in mind and body, merged in the general mass of citizens, and were supposed to have no valid claim for financial aid more than the rest of the citizens of the republic.

The act of 1890, however, established the principle that service in the army or navy even for a brief time thereby en-

titled one for the rest of his life to look to the government for support in any case of personal misfortune. This, too, was not a question of service as a calling, for a long term of years, thereby negativing the possibility of other avocations. It was for a service of at most only three or four years, often of not more than one of two years, and which might be, and in fact often was, for not more than three months. At the minimum, then, a service of three months entitled one to support for the rest of his life should he by any mishap become unable to earn a living by manual labor.

Is the Principle Sound?

If the Civil War was to be the last of all wars in which the republic should be engaged, such a doctrine might be accepted with some equanimity. But in the light of recent experience there are grave questions to be considered. When the country is in danger is the defense of the republic a duty which is owed by all its sons? Is the rendering of such a duty matter of barter and sale? Does the government owe more to its temporary defenders, besides the honor which is their due, than the equivalent of the physical disability actually incurred in the service? Anything beyond that commercializes patriotism and opens the way to organized compulsion on legislation for private benefit.

Acts of 1906, 1907; Age a Basis

The third principle on which pensions have been based appeared in the legislation of 1906 and 1907—the principle of age. The age of 62 years was fixed by statute as in itself a permanent physical disability—and any soldier or sailor of the Civil War who reached that age was thereby entitled to a pension, without regard to the condition of his health, and without regard to his financial need.

The Pension a Reward

Here then was a still more striking departure from former pension principles. The pension was no longer an aid to the former soldier's distress—it was a reward, to which he became entitled by merely living long enough. True, with advancing years it might be presumed that one's capacity for manual labor might be decreased—but this shower of an-

nuities fell on all alike—on the indigent and on the well to do.

Act of 1912; Age and Service

The fourth principle was embodied in the legislation of 1912. The act of that year took account not merely by age, but also of the length of service in the Civil War. The three months man had the minimum pension, the six months man rather more, and so successively to three years or more, which commanded the maximum. This again was based on the idea that the pension was a reward, although no doubt it might in many cases meet a real need. But a clause in the bill which limited pensions to those with a net income of less than $1000 was stricken out in the process of legislation.

Cong. Rec., 62d Cong., 2d Sess., vol. 48, Pt. I, p. 283

In the debate on the legislation of 1912, some striking infelicities of the age principle were made clear.

Samuel Barnhart enlisted in 1862, at the age of 16 years. He served three years, was in 20 battles, was mustered out June 4, 1865. He at the age of 65 was drawing a pension of $20 a month.

David Gillespie at the age of 28 enlisted for 100 days, in August, 1864. He at the age of 75 was drawing a pension of $36 a month.

"John Ticknor was 30 years old in the fall of 1864. He had a farm and raised a big crop of corn and wheat in Illinois and got it harvested and in market. In November following this harvest he volunteered for 100 days and got $600 bounty. He was sent down South with his regiment and they relieved a three-year regiment that was guarding the railroad between Louisville and Nashville. The three-year regiment went to Nashville and was in the battle. The regiment Ticknor was in never got as far south as Nashville, and he got home the last of February, 1865, and put in a crop and never missed the time he was in the service, and now is getting $20 a month, and under the Sulloway Bill he would get $30, while the men that his regiment relieved, two-thirds of them that are living

are not getting that much, and half that are living will be dead before they could get $30."

II. *Widows and Other Dependents*

Act of 1862

The original Civil War pension legislation provided for those depending for support on soldiers or sailors who lost their lives in the service or who died later from disability incurred in the service. The widow received during her widowhood the pension which had been allotted to her husband, and due provisions was made for minor children or other dependents—the minors till they reached the age of 16.

Act of 1890, June 27

The act of 1890 extended a pension to the widow of a Civil War pensioner who died from any cause, without regard to its resulting from a disability incurred in the service. This of course was a species of life insurance for all soldiers and sailors of 1681–5 who at that time were entitled to be on the pension rolls; moreover as the act opened the pension payments without regard to the origin or nature of disability, it was practically life insurance for all who had served in the years in question.

Life Insurance for Civil War Army and Navy

This again was a startling innovation in the pensioning of soldier dependents. That helpless members of a family left destitute by the death of the breadwinner in war service should have the care of the nation seemed a matter of course. But that the nation, in addition to a pension for any sort of physical disability, should also provide life insurance for every Civil War soldier and sailor, was a long step in the extravagant use of taxes. Thrifty young women were not wanting who were willing to invest in matrimony with an old pensioner on assurance of this comfortable annuity in prospect. To be sure Congress was hard hearted enough to limit such widows' pensions to those who had a total income from other sources of less than $250. However, such a limit was sure in time to share the fate of other pension limits. This income limit was dropped by the act of 1908, so far as those

widows were concerned who were married prior to June 27, 1890. But in a few years this proviso was extended. In the act of May 1, 1920, we find the following: "Sec. 4. That the widow of any person who served in the Army, Navy or Marine Corps of the United States during the Civil War for ninety days or more, and was honorably discharged from such service, or regardless of the length of service was discharged for or died in service of a disability incurred in the service and in the line of duty, such widow having been married to such soldier, sailor or marine prior to the 27th day of June, anno Domini 1905, shall be entitled to and shall be paid a pension at the rate of $30 per month."

This it will be seen applied not merely to the widow of a pensioner but to the widow of any member of the Civil War Army, Navy or Marine Corps, provided only that the marriage was contracted before June 27, 1905—40 years after the war ended. One wonders how many such widows were born in 1865.

III. *Arrears Payment of Pensions*

The primary purpose of a pension may fairly be supposed to be the support of the pensioner from year to year. If application for a pension was not made—and in the early years after the war no application was made by the great mass of the former soldiers—it surely should be assumed that need did not exist. But in the extraordinary act of 1879 applications were permitted to be retroactive—an application made in that year might date back to 1863 or 1864, for instance—and if granted the sum of all the payments of the intervening years was paid in one lump. Nothing could easily be imagined more demoralizing to the self-respect of the old soldiers, which had kept them thus far from applying for support from the national taxes.

Arrears Act, Jan. 25, 1879, Supra, p. 173

The pressure brought to bear on Congress by the old soldiers who now were brought to see the prospect of a consid-

erable sum paid at once, by the army of claim agents who hungered for more business, and by their newspaper organs, was irresistible. The politicians who wanted the soldier vote and the politicians who were afraid of the soldier vote, together were in the majority, and this indefensible act was made law. It was unwarranted on any sound principles of pension legislation, on the ground of sound public finance, and quite as much for the inevitable result on future legislation. It was a veritable Pandora's box of pension policy.

Widows' Arrears Act of June 7, 1888

A few years later the logical sequent applied to widows and other dependents. They too became entitled to a pension dating from the death of the husband. If he was killed in battle in 1863, and his widow did not apply for a pension until 20 years later, she not merely was entitled to such annual sum as would keep her in comfort through the remainder of her widowhood, but also had claim to arrears for the 20 intervening years when she was not in need. This was the law which Commissioner Evans found so fertile a source of fraud. The kind-heartedness of members of Congress and the pressure of those interested brought curious inducements to bear on cupidity and weak consciences.

IV. *Protection for the Treasury*

It must not be supposed that Congress has failed in its multitude of pension acts to take any care for guarding the treasury.

In the original acts pensionable disabilities were limited to those actually incurred in the line of duty. A soldier on a furlough who became intoxicated and was injured in a resultant brawl was not thereby legally entitled to a pension. Congress can hardly be responsible for undetected frauds.

The Arrears Act of Jan. 25, 1879, was limited a couple of months later so as to require applications to be filed by July 1, 1880. Congress had been aroused to the vast possibilities

of the act which they somewhat inadvertently allowed to pass.

Act of July 25, 1882, Commissioner may detail clerks to investigate

Various provisions were made empowering the Commissioner of Pensions to verify claims. The flood of claims, however, has been so vast, the nature of the evidence so remote and so difficult to make definite, that no such legislation has been adequate for the purpose—it is doubtful whether any adequate legislation could be enacted. One cannot dip out the Atlantic with a spoon.

Pension Claim Agents

Many legal limitations have been placed on the activities and fees of the pension attorneys (e. g., July 4, 1884; March 3, 1891; Aug. 5, 1892; Feb. 28, 1903; April 9, 1908).

Criminal Code

Nearly all the modes of fraud which have been practiced on the pension funds are covered by the criminal code (Chapter XX, Laws of the United States Governing the Granting of Army and Navy Pensions, Department of the Interior, 1923).

The enormous appropriations for Civil War pensions, while no doubt it is impracticable to eliminate fraud altogether, while no doubt under the laws as they stand many draw pensions who are quite unworthy of any public stipend, while no doubt the grants have relieved distress which is only remotely if at all connected with war service, still have a more significant cause.

The Essence of it All

Members of each House of Congress are dependent on popular vote for reëlection. They are supposed to represent their constituents. If under the party system they can expect to poll substantially the normal party vote, but that vote is not enough to make a majority or a plurality, without adding a certain number of votes from an organized group which is, or is believed to be, a balance of power, there are few politicians who can refuse to support measures which will win that group support.

To be sure, voting money from the federal Treasury for distribution among voters in order to secure their votes can

hardly be denied to be a form of bribery—as the member from New Jersey bluntly stated (p. 185). Can it be distinguished from other forms of appeal to the interest of the electorate?

Protective tariff advocates, claim that such legislation will enable American manufactures to yield larger profits to capital and larger wages to management and labor than would be the case under unrestricted foreign competition.

Low tariff advocates point out that a high tariff of duties on imported goods increases not merely the cost to the consumer of such importations, but also the cost of domestic goods of the same character—thus increasing the cost of living to the consumer.

Each appeal is directly to the financial interest of the electorate, and of those connected with them.

Direct Taxes

All questions of taxes appeal to the pocket nerve of members of the electorate. If it is a matter of direct taxes nothing is obscure. Each voter has before him the simple problem of whether he thinks on the whole that the purpose for which public funds are to be expended is worth while, or not, The burden of proof is on the proponents of the tax, as paying a tax is not usually in itself a source of gratification to the taxpayer. But nothing is hidden.

Indirect Taxes

When it comes to indirect taxes, however, of all kinds, it is quite another matter. One is not always sure that he himself actually pays anything. He does not realize that he is paying more for what he buys—increased costs are tangled together with many elements, and it is always possible to make a plausible case for some other reason besides legislation.

Taxes on Classes

It is still more obscure when a tax apparently falls on one portion of the community only. If those who seem to be exempt are in a majority, as is usually the case in such tax questions, they cheerfully approve a tax to be paid, as they suppose, by those who are more able. Those who do not own

automobiles are quite willing that motor car owners should pay a wheel tax. Those who do not own land do not object to a land tax. The recipients of a small income are glad to have the main burden fall on the wealthy.

Some of this state of mind is reasonable and some is not. Taxes usually in the end become diffused through the whole community. A heavy tax on land means increased cost of farming and hence greater cost of food for all—it means greater rent for homes and so greater cost of living.

Legislators who try to keep taxes low, to be sure, are appealing to the direct self-interest of the electorate.

Bribery at Public Cost

But a distribution of public funds, drawn from the public treasury, and derived from taxes paid ultimately by all the community, either by direct cash transfer or in increased cost of living—a distribution of such funds to a portion of the people, is rather different. Unless the justification is plain and unanswerable, the bribery is only too obvious.

Weight of Active Minorities

It is idle, however, to berate the weakness of legislators. Politicians, unless they succeed at the polls, are usually of little account. The great mass of the electorate will vote a party ticket. Success at an election, then, may depend on the fluctuating groups who may vote one way or another and thus decide the result. The appeal in any election is usually to this margin, rather than to the stable body of voters,—and an active, organized, noisy minority group is always to be reckoned with.

There is, to be sure, a large number of voters who often do not vote at all—who take interest in an election only when attracted by some unusually important issue or by some exceptionally promising candidate. In their hands in the last resort lies the decision. For, so far as the action of the legislative bodies is concerned, legislation under duress is what in these days must be expected. It is not a case of choosing representatives whom the voters trust and then trusting them to act for the public good. They are elected, and then

followed with clamors and cajolings and threats. Too often they legislate under duress.

So far as Civil War pensions are concerned, it is clear enough that they have gone beyond all reason. Civil War Pensions —the Proper Principle

The basis of the original pension acts was sound.

The Commissioner of pensions, in his report for the year ending June 30, 1911, p. 162, put it plainly:

"It was in 1862 considered just that soldiers and sailors should, in the form of pensions, be granted annuities for the purpose of making good any incapacity for the performance of manual labor which was directly chargeable to a wound, injury, or disease incurred in line of duty, and that when death had so originated, the dependent of the one who had given his life for his country should be properly cared for."

The principle is that of pension for disability incurred in the service, or, in case of death resulting from such service pensions for dependents. Such pensions are well warranted. No others are warranted, unless to those of long service—not three months militia or hundred day volunteers—on the ground of actual disability from old age. As was said in the House debate by a member from Wisconsin: "It is a well known fact that many men who were borne on the army rolls for 90 days rendered no actual, effective or meritorious service whatever in a military sense." p. 238

From the point of view of the nation at large and of ordinary reason it is only service of unquestioned character, from duration or exceptional quality, that should give title to a pension from funds raised by taxation. From the point of view of politics however the question is not why should an applicant have a pension, but why should any applicant not have a pension.

Thus there comes into being a large army of beneficiaries of the federal treasury, scattered throughout the nation—all looking to the federal government for their support. This is an example of one way in which the actual power of the central government in unduly aggrandized. Federal Power Aggrandized

CHAPTER VIII

ATTACKS ON THE FEDERAL EQUILIBRIUM BY LEGISLATION— FEDERAL CONTROL OF EDUCATION IN THE STATES

Education under State Jurisdiction

Education, so far as it is provided at public cost, is wholly a matter for the states, and educational institutions on private foundation are incorporated by the states. In the District of Columbia the Congress has such power as elsewhere belongs to the states.

Attempts to Give the Congress Power, 1787

In the constitutional Convention of 1787 several suggestions were made tending to give the Congress certain powers over education, but in each case the suggestions were referred to a Committee and never emerged therefrom. The Constitution is silent on the subject, therefore, and the control of education by the states within their respective jurisdiction comes under their reserved power.

I. *A National University*

Pinckney's Plan

The first suggestion in the Convention relating to education appeared as one of the powers to be given to the federal legislature in the plan of government presented by Charles Pinckney, May 29, 1787. It was the following:

"To establish and provide for a national university at the seat of the government of the United States."

Madison's Suggestions

On the 18th of August, Mr. Madison submitted, in order to be referred to the Committee on Detail, the following powers as proper to be given to the general legislature:

"To dispose of the unappropriated lands of the United States:

* * * * * * * * * *

"To secure to literary authors their copy-rights for a limited time.

"To establish a university.

"To encourage by premiums and provisions the advancement of useful knowledge and discoveries." Madison's Journal, Aug. 18, 1787

The same day Mr. Pinckney also offered a motion to add certain powers to those of the general legislature, and among them the power "To establish Seminaries for the promotion of literature and the arts and sciences." Pinckney Suggests National "Seminaries."

All these suggestions were referred to the Committee on Detail.

The power to establish a university or seminaries was not among those reported out from Committees as to be vested in the Congress, but the exclusive control of the federal district was recommended and this might include the power to establish a university. It was preferred by some, however, to grant an express power, and on the 14th of September "Mr. Madison and Mr. Pinckney moved to insert, in the list of powers vested in Congress, a power 'to establish a University, in which no preferences or distinctions should be allowed on account of religion.' Mr. Wilson supported the motion." But Mr. Gouverneur Morris held it not necessary. "The exclusive power at the seat of government will reach the object." Pennsylvania, Virginia, North Carolina, South Carolina, 4 states, voted for the motion, and New Hampshire, Massachusetts, New Jersey, Delaware, Maryland, Georgia, 6 states, voted against it. Connecticut was divided. Madison's Journal, p. 726

Many eminent men, including George Washington, strongly favored a university under national auspices, thinking that a national sentiment and a better national understanding would be developed by bringing many students together at the federal capital under the auspices of the national government. Madison, as President of the United States, sought to realize the plan which he and Pinckney had tried to embody in the Constitution. In his mes-

President Madison's Message, 1810

sage to Congress of Dec. 3, 1810, he developed his views at length.

"Whilst it is universally admitted, that a well instructed people alone can be permanently a free people; and whilst it is evident, that the means of diffusing and improving useful knowledge, from so small a proportion of the expenditures for national purposes, I cannot presume it to be unseasonable, to invite your attention to the advantages of superadding, to the means of education, provided by the several states, a Seminary of learning, instituted by the national legislature, within the limits of their exclusive jurisdiction, the expense of which might be defrayed, or reimbursed, out of the vacant grounds which have accrued to the nation within those limits.

Senate Journal, 3rd Session, 11th Congress, p. 13.

"Such an institution, though local in its legal character, would be universal in its beneficial effects. By enlightening the opinions; by expanding the patriotism; by assimilating the principles, the sentiments and the manners of those who might resort to this Temple of Science, to be re-distributed, in due time, through every part of the community; sources of jealousy and prejudice would be diminished, the features of national character would be multiplied, and greater extent given to social harmony. But, above all, a well constituted Seminary, in the centre of the nation, is recommended, by the consideration, that the additional instruction, emanating from it, would contribute not less to strengthen the foundations, than to adorn the structure of our free and happy system of government."

Annals of Congress, 11th Congress, 3rd Session, p. 976

The recommendation of the President was referred in Committee of the Whole to a special committee, which reported (Feb. 18, 1811) adversely, on the ground of lacking power under the Constitution for the Congress to maintain such a University. The only question was whether Congress had the power under its exclusive authority over the District of Columbia. The committee held that undoubtedly the Congress could charter a university in and for the District,

but "Although there is no Constitutional impediment to the incorporation of trustees for such a purpose, at the City of Washington, serious doubts are entertained as to the right to appropriate the public property for its support. The endowment of a university is not ranked among the objects for which drafts ought to be made upon the Treasury. The money of the nation seems to be reserved for other uses. Lacking Power Under the Constitution

* * * * * * * * * *

" The matter then stands thus:

" The erection of a University, upon the enlarged and magnificent plan which would become the nation, is not within the powers confided by the Constitution to Congress; and the erecting of a small and ordinary college, with a pompous and imposing title would not become its dignity. If, nevertheless, at any time legislative aid should be asked to incorporate a district University, for the local benefit of the inhabitants of Columbia, and of funds of their own raising, there can be no doubt that it would be considered with kindness, as in other cases; but it must be remembered that this is a function totally distinct from the endowment of a national University, out of the treasury of the United States, destined in its origin and application, to other and very different purposes." The committee therefore reported adversely on the plan. No further action appears to have been taken.

The logic of the special committee seems to have been that: Reasoning of the Committee

1. The Constitution does not give to the Congress power to establish and maintain a national university.

2. The supreme power of the Congress over the District of Columbia is analogous to the power which a state of the Union has over its own affairs.

3. As a state might provide a university for the people of the state, so the Congress might provide a university for the people of the district.

4. A state university would be primarily for the people of

the state. Any students who might be received from outside the state would be merely incidental.

5. A national university established by Congress within the district would be intended primarily for students of the states, and only incidentally for those of the district. Hence the lack of power.

This of course was a view of strict construction which was quite contrary in the understanding of Gouverneur Morris (p. 213, ante).

Madison's Second Attempt 1816

In 1816, the complications caused by European affairs being finally cleared up, President Madison renewed his recommendation for the establishment of a national university. His message of Dec. 3, 1816, briefly adverted to the subject. This part of the message was referred to a special committee in the House of Representatives. The committee reported on the 11th of December, with a bill for the establishment of a national university in the District of Columbia. This bill was read twice and referred to the Committee of the whole House. The question apparently was not reached again until spring, when the committee was discharged and the bill postponed indefinitely (March 3, 1817).

Constitutional Amendment

Evidently the Constitutional power of Congress in the premises was again in doubt, as on the 12th of December the day after the bill was introduced, a resolution was offered in the House to amend the Constitution as follows: "The Congress shall have power to establish a National University." This resolution was defeated.

The Plan of 1816–7

Annals of Congress 14th Congress, 2d Session, p. 268–9

It may be of interest to note what was at that time thought adequate provision for a national university to be superior in resources to institution then existing in the states. The bill set forth that there should be set aside for the university certain lots facing the Eastern branch of the Potomac, valued at $750,000 and squares 1–6 adjoining, valued at $200,000. It was proposed then to erect three sets of buildings, viz.; residences for the Principal and six professors,

two buildings, 75 x 54 ft., at a cost of $60,000; a building to house 160 students, providing lodging and a refectory, 265 x 46 ft., at a cost of $75,000; a building for lecture rooms, 75 ft. square, at a cost of $75,000. The cost of planting and inclosing the grounds was estimated at $20,000. The total of $1,150,000 no doubt seemed generous, even lavish, to Madison's Congress.

Indeed Harvard College at that time had total assets of less than $300,000.*

Recommendation by President John Quincy Adams, 1825

President John Quincy Adams in his message of 1825, referred with regret to the failure of previous legislation to provide a national university, and a select committee was appointed to take into consideration the implied suggestion. The committee made no recommendation for a university.

Plan for Constitutional Amendment Again Introduced

A few days after the appointment of this committee Mr. Bailey of Massachusetts moved in the House an amendment to the Constitution giving certain additional powers to Congress, relating especially to internal improvements, and including the power "to establish a National Univeristy, securing to each state a just proportion of advantages." The resolution was referred to the committee of the whole House on the state of the union, where it apparently disappeared.

The question slumbered for many years after 1825.

* The Secretary to the President of Harvard writes, under date of February 5, 1925:

"It was not until 1825 that the Treasurer started to print his annual report. In 1810, however, there was a change of Treasurers, and the new Treasurer receipted for all the property of the University at that time. The figures in that year were as follows:

Houses and Lands in Cambridge,	$ 21,073.93
Stocks, bonds, notes and legacies,	230,180.69
Cash,	12,417.06
Total assets	$264,417.68

There cannot have been any very large increase over these figures in 1816, for in 1825 the total had only increased about $20,000 over the figures of 1810."

Report on Education —U. S. Commissioner to the Paris Exposition of 1867

The report of the United States Commissioner to the Paris Exposition of 1867 gave emphasis to the extreme backwardness of American universities as compared with those in Europe. Said Commissioner Hoyt, "To tell the plain truth, the very best of our many universities are but sorry skeletons of the well-developed and shapely institutions they ought to be, and must become, before they will be fairly entitled to rank among the foremost universities of even the present day.

* * * * * * * * * *

The Situation as to Universities in the United States at That Time

Let us have, without further delay, at least one real university on the American Continent."

It is quite true that American institutions of higher learning at that time were essentially colleges, rather than universities—there were no real universities in the land, and ambitious American students were accustomed to resort to Europe, and in a large degree to Germany, for advanced work. The Johns Hopkins University, a light in the darkness, was just getting its organization.

Movement for a National University Renewed 1873

In March, 1873, the Committee on Education and Labor of the House of Representatives, reported out a bill to establish a university in Washington under national auspices. The report of the committee gave the following as the reasons for believing a totally new institution to be essential:

Reports of Committees H. R. 3rd Sess. 42d Cong., No. 90

"1. That none has, or is likely to have, for a century to come, the pecuniary resources essential to the highest and most complete university work.

"2. That none can be made so entirely free from objection on both denominational and local grounds as to ensure the patronage of the people, regardless of section or artisan relationship.

"3. That no institution not established upon neutral ground, or other than *national* in the important sense of being established by the people and for the people of the whole

nation, and in part for a national end, could possibly meet all the essential demands to be made upon it."

It was proposed to endow the national university with the income at five per cent on twenty million dollars. The bill did not pass, and in subsequent Congresses thus far no further attempts to secure a national university at Washington have met with success. It has been steadily the policy of national organizations of teachers to urge the importance of such a university, and the constitutional question perhaps has less weight than was the case a hundred years ago.

Present Conditions Radically Changed

But other conditions are very different, not merely as compared with 1925 but as compared with 1873. No one of the three points urged by the Committee of the 42d Congress is quite true today. The establishment of new and heavily endowed universities of real university grade, the thoroughly undenominational character of the greater institutions throughout the republic, the great additions to the resources of older institutions, the utter disappearance of sectional or local character from all, are matter of common observation. Moreover the vast increase in the number of students of higher grade would make any one national university impracticable. A number of universities, of real university character, adequately supported whether from state funds or from generous private endowment, in fact will provide not a national university, but several national universities.

II. *The Public Domain*

The recommendation of Mr. Madison (p. 212) for giving the Congress power to dispose of the unappropriated lands of the United States took the form in the Constitution, that

U. S. Const., Art. IV., Sec. 3

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Public Land

The "Territory of the United States" comprised at that time a vast body of largely unappropriated lands lying west

of the original thirteen states, afterwards increased to an enormous extent by acquisitions from France, from Spain, from Mexico and from Russia. The power of the Congress to dispose of the public land had later an important influence on public education. It may be proper then to discuss briefly the relation of the federal government to the Public Domain.

Cession of Land from the States

The national territory east of the Mississippi River included the great area north of the Ohio River, which was afterwards known as the Northwest Territory, and that lying west of Georgia, the Southwest Territory. This was ceded to the United States by the various claimant states—Massachusetts, Connecticut, New York, Virginia, for the Northwest, and South Carolina and Georgia for the Southwest. In the Northwest there were various overlapping and conflicting claims by the states, but all were vested in the United States, and hence the disputes were finally quieted. The land of Tennessee was granted by North Carolina, but was almost immediately admitted as a state to the Union—as was Kentucky, which had been a part of Virginia.

Jurisdiction and Title to the Soil

What the states ceded was dominion, and title to the soil—the first without limit, and the latter so far as grants had not already been made. In the Northwest Territory there were a few settlers, mostly French, when the Treaty of 1783 with Great Britain confirmed the American title, and Virginia after the war had granted certain lands to the officers and soldiers of the revolutionary army. Connecticut (1786) in her cession reserved a strip of land on the shore of Lake Erie —the "Western Reserve," in which is the city of Cleveland today. Connecticut later (1800) granted the jurisdiction over the Reserve to the United States. The soil, however, the state in part granted to sufferers from British depredations on her coast during the Revolutionary War, and in part sold to individuals for a sum of about $1,200,000. This was set aside as a school fund for the state.

Thus the United States acquired a great body of unsettled

land, with jurisdiction over all and with title to nearly all the soil. It comprised 404,955.91 square miles, or 239,171,787 acres. Donaldson, p. 11

Subsequent acquisitions by treaty with foreign nations brought the total Public Domain to 2,889,175.91 square miles, or (deducting Tennessee, whose soil had been granted to individuals by North Carolina), 1,818,462,522 acres.

The initial steps which led the claimant states to relinquish so great possessions for the benefit of all the states were taken by the State of Maryland in 1779. At that time the pending question was the adoption of the Articles of Confederation. Maryland was unwilling to unite with the other states under these Articles so long as some states retained these extensive claims. They would be extremely prejudicial, the Maryland legislature thought, to the small states which had no such landed wealth—for in fact Maryland spoke the sentiments of all the other non-land-claiming states—New Hampshire, Rhode Island, New Jersey, Pennsylvania. As the instructions to the Maryland delegates in Congress recited: "Virginia, by selling on the most moderate terms a small proportion of the lands in question, would draw into her treasury vast sums of money, and, in proportion to the sums arising from such sales, would be enabled to lessen her taxes. Lands comparatively cheap, and taxes comparatively low, with the lands and taxes of an adjacent state, would quickly drain the state thus disadvantageously circumstanced of its most useful inhabitants; its wealth and its consequence in the scale of the confederated states, would sink, of course." The validity of the claims, also, mainly based on royal charters, was questioned. Further in fact these claims, at least north of the Ohio River, were conflicting to a great extent, and the settlement of such conflicts presented very serious difficulties. The cession to the United States at once quieted all titles—the United States had them all. Donaldson, p. 61

The Virginia deed of cession (1784) stipulated that one of

the conditions of the grant was the future formation within the limits ceded of several states to be duly admitted to the Union on the basis of an act of Congress of the spring of the same year.

Ordinance of 1784

This act of the Congress of the Confederation provided that when a sufficient number of inhabitants should be assured, certain areas within the western territory should be admitted to the Union as states, on the same basis as the existing states. Jefferson's draft of the ordinance provided for seven states, and proposed for them a list of names, ingenious and quaint enough: Sylvania, Michigania, Cherronesus, Assenesipia, Metropotamia, Polypotamia, Polysipia. These designations were omitted from the Ordinance—and for the omission remaining in subsequent proceedings the innocent inhabitants of the northwestern states may be deeply thankful. The original draft of this ordinance, made by a committee of which Jefferson was chairman, contained a clause prohibiting slavery in said new states after the year 1800, but this clause was rejected in the Congress—six states voted for it, less than a majority (seven).

Ordinance of July 13, 1787

Later, when actual plans were on foot for settlement on a considerable scale the preceding ordinance was rescinded, and an ordinance was adopted for the government of the territory north of the Ohio river. This ordinance contained a clause prohibiting slavery, and also certain articles of perpetual compact between the United States and "the people and States of the said territory." These among other things include a bill of rights, and also embody this mandate: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." This placed a permanent obligation on the people of the new states, so far as education is concerned. Nothing is said as to the maintenance of churches. It may be inferred that religious organizations are left at the option of all, while the support of schools becomes a public duty.

Education a Public Duty

The great acquisition of wild land in the hands of the federal government would be as some thought an endless source of riches. It was practically the only dependable asset of the republic, and to that asset the soldiers of the Revolution looked for the recompense of their long years in camp and on battlefield. The pay in continental currency was scanty enough, but the Congress had promised them land, even before having any land to give. But Virginia and other states had rewarded their veterans with land grants, and the Continental line expected the same from Congress. And it also was expected that from the sale of virgin soil there would be established a sinking fund which in the end would liquidate the entire revolutionary debt.

The Public Domain a Financial Asset

It was also thought desirable that the wilderness should be cleared and settled, and that thus a series of new states should be added to the Union. In fact there had been for years a stream of emigration flowing to the west—over the mountains to "the dark and bloody ground" of Kentucky, to the forests of western New York, to the Valleys of Tennessee.

The Public Domain for New Homes

There were difficulties enough in settling the wilderness. Indians were fierce, fevers lurked in the forests, transportation was slow and cumbersome. Even when the woods were cleared away and crops secured, it was hard to find a market for the surplus over the rough roads which led to the eastern settlements. No one then could forsee the railroads—and it is the railroads which after all have made possible the settling of our great new territories. The income from land sales did not yield the returns which so many expected. The cost of surveys and of the land administration went far to use up the receipts. The most far-sighted financiers were skeptical of great returns. In his Report of the Public Credit (January, 1795) Hamilton said:

"The lands in the western territory of which the government of the United States has acquired the right to the soil

are estimated in a report of the late secretary of state to amount to 21,000,000 acres. This quantity, at twenty cents per acre . . . would yield a sum of $4,200,000. . . . If it ultimately yields $3,000,000 it will probably equal any reasonable expectation." In his report to the House of Representatives, July 20, 1790, submitting a plan for the disposition of the public lands, Hamilton suggested a price of thirty cents an acre.

Donaldson, p. 208

Prices seem ridiculously small, as we look back at them. The first great block sold, that to the Ohio Company, in 1787, was 3,000,000 acres at the rate of $66^2/_3$ dollars an acre. Agricultural land prices have varied from $12^1/_2$ cents to $2.50 an acre. A quite general price was $1.25.

There were endless difficulties in handling the business. Speculators were eager to get large tracts at a low price, expecting to sell small parcels at a high price. Squatters ignored the land offices and settled where they pleased, trusting that in time they would get good title—as in fact they often did. Even lands held for Indian reservations were overrun by lawless immigrants.

Free Soil

In the end the policy of settlement prevailed over the hope of profit for the national treasury and the Homestead Act of 1862 gave 160 acres to each bona fide settler without charge, and further acts extended the liberality. Some will remember the popular ditty chanted in the years just preceding the Civil War,

"For Uncle Sam is rich enough
To give us all a farm."

Gifts of land to States for Education

The Public Domain belongs to the United States, and the Congress is not limited at all as to its disposition. Congress may by law sell the land, hold it for general purposes, or give it away, as may seem expedient. To repeat (p. 219), the power is found under an express clause of the Constitution (Art. IV, Sec. 3, § 2)—"The Congress shall have Power to

dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The "Territory" of the United States is the public land.

The Colonies had been accustomed to set aside land to provide for churches and schools, and it was quite natural then for the Congress to provide for education in planning for the formation of new states carved out of the Public Domain.

The ordinance of 1787 (July 13) was adopted in the light of an application for a large purchase of land by a group of revolutionary soldiers, the Ohio Company. Ten days later (July 23) the Congress authorized the Board of Treasury to contract for the sale in question, making certain reservations for specified purposes.

In 1785 (May 20) an ordinance of Congress had adopted the system of rectangular surveys for the western lands ceded by the states, on parallels of latitude and meridians of longitude. A township was fixed at an area six miles square, made up of 36 sections each one mile square and containing 640 acres. The sections in a township are numbered consecutively in regular order. The system seems to have originated in the report of a committee of Congress in 1784, Jefferson being Chairman of the Committee. He planned for divisions as a decimal scale, but the present plan took its place in 1785, when Mr. Jefferson was abroad.

Donaldson, Ch. VII, gives full details of the system

The ordinance of 1785 stipulated that "There shall be reserved the lot No. 16, of every township, for the maintenance of public schools within the said township."

Journals of Congress, 1785, pp. 520–21

In the authority given to the Board of Treasury to sell lands to the representatives of the Ohio Company it was specified that the lot No. 16 in each township should be reserved for public schools, in accordance with the ordinance of 1785; and in addition the following: "Not more than two complete townships to be given perpetually for the purposes of an university, to be laid off by the purchaser or purchasers,

Ibid., Appendix, p. 17

as near the centre as may be, so that the same shall be of good land, to be applied to the intended object by the legislature of the State."

The land sold to the Ohio Company was originally estimated at 2,000,000 acres and was sold at $66^2/_3$ cents an acre. The amount was later reduced to 822,900 acres.

Somewhat later in the same year (1787) another large tract of land in what is now the State of Ohio was sold, with reservation of lot No. 16 in each township for public schools, and a further reservation of one township for an academy.

These reservations in the sales of lands which, with others added, later became the State of Ohio, were the precedent thereafter followed in each case of a new state of the Union formed from the public domain. Each state acquired a certain body of public land the proceeds of which should be devoted to the maintenance of common schools, and another body of land to be used for a university. Besides these grants for educational purposes lands of special character—swamp lands and lands containing saline deposits—have in many cases been given to new states, and the proceeds have to a large extent been devoted to school purposes.

Bureau of Education, 1922, Bulletin 47

In the 29 public land states there have been given by Congress upwards of 73,000,000 acres of lands for Common schools.

For universities, seminaries and the like, each new land grant state has had assigned one or more townships—usually two—upwards of 1,100,000 acres in all.

Altogether, in one way or another, the states have been given over a hundred million acres of public land for educational purposes alone.

Then, too, a percentage of the receipts of the federal government from the sale of public lands, or of receipts from forest reserves or from various valuable deposits in the public lands, has been given to states, for educational and other purposes.

Beginning with 1862 (the Morrill Act) public land was distributed among all the states for colleges of agriculture and mechanic arts—30,000 acres to each state for each Senator and Representative to which the state was entitled in the Congress. This was a new departure inasmuch as it now gave land to states in which there was no public land at all. In 1890 the Second Morrill Act supplemented the first by a grant of money received from the sale of public lands, to be distributed among all the states for the further aid of the agricultural and mechanic arts colleges.

Colleges of Agriculture and Mechanic Arts

III. *State Administration of Land Grants*

Thus the Congress, by virtue of its express and unlimited power under the Constitution to dispose of the public domain, has given to the states, for educational and other local purposes, a vast property in land or the proceeds of land. How the states have administered the trust is a matter of no small interest.

The first question confronting the new states so far as educational lands were concerned was whether they should be sold at once and the proceeds devoted to immediate needs of education, or whether they should be held for the benefit of future generations.

There were strong motives for an early sale. Whatever funds could be realized at once would relieve the taxpayers to that extent and would make it possible for schools of some sort to be established immediately. Then, too, there were speculators in abundance who were eager to get these lands at a low price, hoping to realize profit from later disposal of them.

As at the outset the states were not authorized to sell the lands—they were leased for what they might bring. These leases were not very profitable, however, as there was abundance of other public land to be had at a low price, and more-

over the tenants were not interested in proper conservation either of soil or of timber.

In 1826 Congress authorized the sale of school lands in Ohio, and thereafter such sales were usually permitted, it being supposed that the proceeds would be retained as a permanent educational fund, the interest only to be used for school purposes.

Losses of State Educational Funds

The losses from these educational trust funds have been very heavy. Scanty enough as they were at the outset, from the scandalously low prices at which the lands were sold, they were further depleted in many ways.

Lands were sold with an initial cash payment and on a credit for remaining payments over a term of years. The lands being then denuded of their valuable timber, the purchaser often defaulted further payment and the property with greatly lessened value reverted to the state.

Funds resulting from sales were often invested in doubtful securities which ultimately ceased to be doubtful and became worthless.

Dishonest management in many forms was responsible for heavy losses in many states.

War, fires and floods accounted for some disappearance of funds.

In many cases the states have "borrowed" the educational funds, using them to pay state indebtedness or to make internal improvements, and paying interest at a rate fixed by law for school purposes. In this last case it is evident that what appears on the books of account of the state as a "permanent school fund" is not a fund at all, but is in fact a debt, on which the state is paying interest at the expense of the taxpayers.

If the liberal grants of land from the federal government to the states had been even measurably conserved, there would be today a great capital, carefully invested, the income of which would relieve the taxes of a large part of the cost

of public education. Instead we have a record in many states of waste, mismanagement and dishonesty which leaves only a sorry remnant of what might so easily have been a great educational fortune.

One state is cited by an author who has made an exhaustive study of the subject as an example.

Swift, Federal Aid to Public Schools, p. 39

"A study of the federal land grants devoted by this State to her permanent public school fund shows that had this fund been properly managed that State would today possess a permanent endowment of nearly $100,000,000, yielding an annual revenue of $4,600,000, more than one-third of the total amount expended by that State for public schools in the year 1920. Instead of any such princely sum the State cited has today a nonproductive fund whose paltry annual income of less than a hundred thousand dollars is a pure fiction raised by a State tax." Governor Ford, in his History of Illinois writes in 1847 (p. 79): "To relieve the State treasury from debt, the Legislature, to save the popularity of members by avoiding the just and wholesome measure of levying necessary taxes, passed laws for the sale of the Seminary township, and for borrowing the proceeds of the sale and the three-per-cent school fund; and of paying them out as other public moneys, and for paying an annual interest thereon to the several counties for the use of the schools. . . . Thus, as I conscientiously believe, was a township of land sacrificed at low prices, the school fund robbed, and a debt of nearly half a million dollars fastened upon the State, rather than that the members would run the risk of not getting back to the Legislature, or of being defeated for some other office."

Illinois "Borrows" Educational Funds

Ohio's Curious Record

Illinois was not alone in plans for juggling with the school lands. In Ohio in 1804 the legislature enacted that a university should be established at Athens, and that the two townships of the federal grant should be its endowment. Provision was made for a valuation of the lands, and then

Peters, p. 103

they were to be leased "for ninety years, renewable forever, on a yearly rent of six per cent on the amount of the valuation." The land so leased was to be subject to a revaluation at the end of thirty-five years, and again at the expiration of sixty years, on each of which valuations the lessee was to pay a rent of six per cent until the next was made. At the end of ninety years a final appraisal was to be made, which should thereafter serve as the basis of the rent.

This would seem a very fair arrangement, and nearly half of the grant was leased on those terms.

Peters, p. 130

But shortly afterwards a new statute permitted leases for ninety years, with privilege of renewal, rent being at six per cent on the assessed valuation. Nothing was said about revaluation.

When the period of thirty-five years had expired the trustees proceeded, in accordance with the original law, to have a revaluation made. This was opposed by the lessees, but the

Peters, pp. 135, 156

Courts decided that the second law did not repeal the revaluation clauses in the first, and that revaluation therefore was authorized. At once the lessees brought pressure to bear on

Knight, p. 121 and note

the legislature, and that body passed an act prohibiting revaluation. Thus "no revaluations have been made, and nearly two townships of the choicest land in the State are rented on a valuation made seventy-five years ago when Ohio was a comparative wilderness. The rent from forty-five thousand acres is but forty-two hundred dollars per year."

"It is stated that the lessees, accustomed for thirty years to pay a merely nominal rent of from 10½ to 12 cents per acre, would not submit to a reappraisal; that even after the legality of the reappraisal had been affirmed by the Supreme Court, it was impossible to collect the additional rent; that whenever a suit was instituted the jury, in utter defiance of their oath, the law, and the evidence would uniformly render a verdict in favor of the lessee; and that the bill mentioned

above was lobbied through the legislature and put an end to the contest."

In 1861 the trustees of the university appealed to the legislature of the state for aid, in recognition of the fact that a legislative act had deprived the university of great material resources which it should have had in accordance with the original grant of land for its support. They said, referring to the act of 1843: "By this adverse legislation the trustees are unable at any time, and for all time to come, to obtain any increased income upon the increased value of the lands; the object and intent of the donors, the United States, are frustrated; the labors of the Legislature of this State, previous to the Act of 1843, according to the interest of the donors, are rendered inoperative and void, as to increase and accumulation of means; and the friends of the institution are left to mourn over its prostrate condition without hope, except at the hands of your honorable body in accordance with what they deem the equity and justice of the case." Peters, pp. 250–1

The memorial was presented to the state senate of Ohio, and by that body referred to the Standing Committee on Universities, Colleges and Academies, of which Committee the chairman was James A. Garfield, afterwards President of the United States. The Committee made a detailed report, a very interesting document. Among other things they said: "Upon investigation of the subject your committee have become well satisfied that the memorialists have presented a fair case, entitling them to redress at the hands of the Legislature of this state; that the act of March 10, 1843, gives evidence of an unfortunate exercise of power without right; that it is unjust to the University of Ohio, unjust to the donors of the endowment, and unjust to the character and honor of the State in her relation to both of the other parties and to herself. And your Committee would have no hesitation in introducing and recommending, at this time, a bill for the repeal of that act, except from considerations growing out of Peters, pp. 248–52

time, and of individual rights acquired under the operation of that act."

If the State of Ohio has made large appropriations for the support of an institution thus defrauded of its just dues, such appropriations, and the general taxes which have produced them, are matters of justice rather than generosity. Meanwhile a number of private individuals reaped the benefit of the great increase of property values which belonged to the University; and the taxpayers of Ohio are charged for an indefinite time, virtually in perpetuity, with paying out of their pockets the income which should have come from the large gift of the federal government.

The lavish grants of public land to the states from the federal government has been of some use, undoubtedly. It would be strange if some part of the vast values should fail to be diverted from their object; and a fair number of the states have managed the educational funds rather well. Still the proper use of public funds derived from taxes which the people pay and realize that they have paid, is more easily made sure than that which comes as a gratuity. Land subsidies after all have been of questionable value to the states which are the recipients.

Keith and Bagley, pp. 73–74

The Morrill Act of 1862 gave the states 16,400,000 acres of land, an area about equal to that of the State of Maryland. To the states which did not contain public land, scrip was given, for which land might be located within the public land states. This scrip was usually sold at a low price. Pennsylvania sold at the rate of fifty-five cents an acre, and Ohio at fifty-four cents. In New York Ezra Cornell contracted to take all the state scrip at sixty cents an acre, with the stipulation that all his receipts above that price should be returned to the state for the endowment of a university. He sold most of the land at about $6.73 an acre, thus yielding for the university (Cornell) upwards of $5,500,000. But most of the states had a policy less enlightened.

Special References

The proceedings of Congress and the Statutes at large contain official action on the public land question. Reports of the General Land Office and of Committees of the Houses of Congress give much information. Of especial value is "The Public Domain, its History, with Statistics" by Thomas Donaldson, (47th Congress, 2d Session, House of Representatives, Misc. Doc. 45, Part 4), 1882–3. Also the Report of the Public Lands Commission, (58th Congress, 3d Session, Senate Doc. No. 189), 1905, is valuable.

There are several books and monographs on the subject. Among them may be noted:

History and Management of Land Grants for Education in the Northwest Territory, by George W. Knight (Papers, American Historical Association, Vol. I, No. 3), 1885.

History of Federal and State Aid to Higher Education in the United States, by Frank W. Blackman, Professor in the University of Kansas. (Bureau of Education, Circular of Information No. 1, 1890. Contribution to American Educational History, No. 9.)

The Origin of the System of Land Grants for Education, by Joseph Schafer (Bulletin of the University of Wisconsin, No. 63).

Federal Land Grants to the States with Especial Reference to Minnesota, by M. N. Orfield, 1915 (The University of Minnesota, Studies in Social Science, No. 5).

A History of Public Permanent Common School Funds in the United States, 1795–1905, by Fletcher Harper Swift, 1911.

Federal Aid to Public Schools, by Fletcher Harper Swift, 1923 (Department of the Interior, Bureau of Education, Bulletin, No. 47).

The Nation and the Schools, by John A. H. Keith and William C. Bagley, 1920. An interesting discussion, especially advocating the Smith-Towner Bill.

A History of the Public Land Policies, by Benjamin Horace

Hibbard, University of Wisconsin, 1924. A comprehensive and thorough treatment of the whole subject.

The Relation of the Federal Government to Education: Addresses at the Installation of David Kinley as President of the University of Illinois, 1921. (University of Illinois Bulletin, Vol. XIX, No. 23, Feb. 6, 1923.)

Legal History of Ohio University, Athens, Ohio, by William E. Peters, Cincinnati, 1910.

IV. *Money Subsidies to the States*

The public lands and the proceeds of their sale are subject to the unlimited control of Congress, and may be given to the states if Congress so desires. Both have been thus given.

Per Centum Funds, Orfield, pp. 77–82

The so-called "per centum grants" have been a certain percentage of the proceeds of sales within their borders which have been distributed among the states under specific conditions—usually in early days to be used for internal improvements, and later for common schools. The per centum funds, it will be noted, have not been derived from taxation.

The Hatch Act, 1887

In 1887 an act of Congress (the Hatch Act) provided for the establishment of experiment stations at the various land grant colleges, with an appropriation of cash for each from the proceeds of land sales.

Second Morrill Act, 1890

In 1890 the second Morrill Act still further provided for the land grant colleges by appropriations from the money arising from the sale of public lands.

The Deposit Fund of 1837

The United States Deposit Fund of 1837, so far as it was not wasted by the states, was quite largely used for state ecucational purposes. It is at times treated as a cash subvention to the states from the treasury of the United States. This of course is erroneous, as in fact the whole amount—some $28,000,000—was placed on deposit with the states, subject to recall by the federal treasury. It never has been recalled, and very likely never will be. Still, it is not a gift, but a deposit, held in trust by the states for the United States.

111 U. S. 46–8

The federal treasury was in a curious situation at the time when this action was taken. The entire debt of the United States had been paid, and the receipts were piling up a surplus. Political exigencies made it impracticable to lessen taxes, and no agreement could be reached for extensive public works. To give the money to the states outright many held to be unconstitutional, and the device of a deposit was hit on as a sort of compromise in which there would be a general concurrence. The act of Congress required each state, should it accept its share, to pledge the faith of the state "for the safe-keeping and repayment thereof." Nevertheless many states accepted the fund with no expectation whatever of repayment. What the states did with the money is quite instructive. Rather monotonous items are such as these: "Lost in bad banking"; "Used up long since in general appropriations," "Wasted on improvements," "Used to pay the State debt," "Used to pay the internal improvement debt," "Interest charge still paid by the State to the School fund." The last item shows the policy followed by several states. The principal sum was used up by the state, but interest on more or less of it is paid in annually to some school fund—and hence comes from the tax-payers. A few states retain the principal, using the income in the main for schools.

Act of 1836

Bourne, pp. 122–3

Indeed, the deposit of federal funds came at a time when there was an insatiable demand for public improvements—canals and railroads in particular—largely to be financed by state evidences of indebtedness. In the end the "improvements" often were left incomplete, while the state debts remained. The governor of Maryland in his message of December, 1842, gave a vivid picture of the situation:

"The distribution law (miscalled the deposit act), which beggared the General Government, whilst but few of the recipients of its bounties have been enriched, caused a most unfortunate revolution in public feeling if not in public opinion. The possession of that fund, stimulating as it did the wildest

63 Niles, 315

speculations, destroyed at once all those salutary restraints found in the habits of the people and the conditions and powers of their local governments. An inexhaustible fountain of wealth, it was believed, had been opened, which was to flow in perennial streams into the state treasuries. State legislators, it was thought, were no longer to be limited in their operations, or abridged in their expenditures, by the amount of revenue they might be emboldened to take directly by taxes from the pockets of the people. A new source of supply was to come through the breach made in the federal Constitution. Private property was to be obtained for public purposes, by a less perceptible, because more circuitous, route. High tariffs were to be levied to supply not only the demands of the national treasury but, in conjunction with the land sales, to furnish a surplus for distribution after that deposit was exhausted. Under the influence of these and similar delusions, the large and oppressive debt of Maryland has been contracted."

While it is true that the people of the states very generally supposed the deposit to be a gift, still the main sponsors for the deposit act in Congress held strongly both to the unconstitutionality and the inadvisability of an actual gift to the states from the proceeds of federal taxation. Both Clay and Webster agreed to that end. Clay put it concisely:

6 Clay's Works, 233

"There is no power or authority in the General Government to lay and collect taxes in order to distribute the proceeds among the States. Such a financial project, if any administration were mad enough to adopt it, would be a flagrant usurpation."

Henry Clay could not foresee some of the educational bills which have been pending now for some years in the Congress.

Distribution Act of 1841

Donaldson, p. 753

In 1841 an act was passed to distribute among the states the net proceeds of public land sales. The act was so limited that only one distribution was made—and this sum in any case was not the proceeds of taxes.

A New Policy—Distribution of Money from Taxes

Thus far, it will be seen, grants to the states had come from the public lands, and however they have been used or misused, there can hardly be doubt that they have been quite within the constitutional authority of Congress. We come, now, however, to acts which proceed to distribute among the states the proceeds of taxes—what Clay called "a flagrant usurpation."

Act of 1903

Hidden Clause

In 1903 (Feb. 7) an act was passed relating to free homesteads in an Indian Reservation in the State of Washington. A clause in this act, hidden away in a totally irrelevant statute, provided that should the income from the sale of public lands be unsufficient to make the payments to Agricultural Colleges under the Morrill Acts, then the United States should make up the deficit from any moneys in the Treasury not otherwise unappropriated.

The Adams Act, 1906

The Adams Act of 1906 (March 16) was an amendment to the Act of 1887, whereby the Agricultural Experiment Stations were created (the Hatch Act). The appropriation for maintenance of Agricultural Experiment Stations was increased by $5000 for each state, with progressive annual additions for a term of years. These appropriations were made, no longer from the proceeds of land sales, but from funds in the Treasury not otherwise appropriated—in short from federal taxes.

Act of 1907, Nelson Amendment

In 1907 was enacted the so-called Nelson Amendment to the Morrill Act of 1890. This amendment provided for supplementing the payment from the income of land sales to the Agricultural Colleges by increasing sums annually up to $50,000, from the general funds of the United States.

A Grant From Taxes

Here again is a frank appropriation for education in the states from federal taxes, not from the public land sales. This is exactly what Henry Clay considered unthinkable. An advantageous precedent is always followed, and this precedent, being uncontested, has been followed promptly and largely. That this would be the result was clearly apprehended

at the time by some members of Congress who were fearless enough to tell the truth bluntly. A brief quotation from the debate in the House of Representatives on the Nelson Amendment, March 2, 1907, may illustrate. Mr. Wadsworth of New York, said:

Congressional Record, 59th Congress, 2d Session, pp. 4490–1

"We are already appropriating to Agricultural Colleges $25,000, and this seeks to add $5,000 a year to that sum, until the total reaches $50,000 a year. To my mind there is a more serious objection than that, Mr. Speaker, it opens the widest door toward centralization of power in the federal government. It is the longest step toward centralization that this House has ever taken.

"Let me show you how easy the steps are. Last year we passed the Adams Bill, so called, giving $15,000 a year for the experimental stations. I said then I was opposed to it, and I thought every state ought to take care of its own. Now the next thing in the programme will be $15,000 or $25,000 for Agricultural Colleges, and the step, as you see, has come. Now let me show you the bills that are pending along this line before the Committee on Agriculture: 'To apply a portion of the proceeds of the public lands to the State Normal Schools.' Now, there are twice as many State Normal Schools as there are Agricultural Colleges, and twice as many votes behind them to pass that measure in this House. Another is this bill in question. Another is 'For the maintenance of Agricultural Colleges in Congressional districts'—; another, 'To provide'—listen—'To provide an annual appropriation for industrial education in agricultural high schools and city high schools'— . . .

"Now, Mr. Speaker, the next step will be the public schools; and there you have federal governmental supervision of your school systems and Federal governmental control of your education." . . .

Mr. Scott of Kansas, said:

"I may be pardoned if I make reference to a personal ex-

perience. As a member of our own State legislature, when bills came before the Committee of which I was a member making appropriations for the various educational institutions of the State, we took judicial notice of the fact that the Agricultural College was getting $40,000 a year, as it was at that time, from the Government, and we cut the appropriation from the State treasury by just that amount. If we pass this measure, it simply means that when the next legislature meets the amount of money to be appropriated from the State treasury will be reduced by just the amount this bill carries."

Forecasts of Federal Control

This same drift had been foreseen by others long before the debate of 1907—in 1873 Senator Sherman of Ohio and Senator Morgan of Alabama predicted that in the end such measures would lead to complete federal control of state education.

The precedents of 1906 and 1907 were the basis of subsequent acts of 1914 and 1917 and of bills introduced and still pending for still more sweeping federal meddling with education in the states.

Smith-Lever Act, 1914, Agricultural Extension Instruction

The Smith-Lever Act of 1914 provides for agricultural extension work by the Agricultural Colleges in coöperation with the Department of Agriculture. The appropriation, again from federal funds raised by taxation, beginning with $480,000 is to reach a total of $4,100,000 a year.

Smith-Hughes Act, February 23, 1917

The Smith-Hughes Act, a most extraordinary measure, proposes to coöperate with the states in teaching agricultural subjects, in teaching so-called vocational subjects, and in the preparation of teachers for all of them. A federal board is created to carry out the provisions of the law. For the payment of teachers and administrative officers in agricultural subjects there is made an annual appropriation reaching $3,000,000 in 1926, and a like appropriation relating to those conducting vocational subjects in other industries. For the preparation of teachers the appropriation of 1926 is to be $1,000,000.

Vocational Educational Board

The federal board consists of three members of the Cabinet, the Commissioner of Education, and three citizens appointed by the President.

The federal funds under this act are to be distributed among the states under conditions, very specific and detailed, and under the close supervision of the federal board. Moreover, all sums allotted to any state can be paid only if the state appropriates an equal sum for the same purpose, and further if the state has in advance officially accepted the provisions of the act. The state, too, must appoint a state board to control the work, and this state board must prepare a detailed plan covering the content and methods of instruction proposed, to be submitted for approval to the federal board.

States Free to Decline

Of course no state is compelled to accept the federal funds. But the pressure on the state authorities to receive federal money needs no discussion.

Educational Implications of the Act

The detailed requirements as to vocational education in the statute presuppose that the educational policies involved are well established principles. They were well settled, perhaps, in the minds of the proponents of the measure.

The requirements also imply a complete divorce between vocational education and common school education in general. It may be that those conducting the latter are not qualified to judge of the merits of the new plan. Perhaps those conducting no education at all are better qualified.

However these things may be, this is the situation:

A Congressional Curriculum

An act of Congress has made a detailed plan, with content and methods of a curriculum, for instruction alike in all the states. There is to be a practical uniformity.

Actual Federal Control

It is idle to contend that such subsidies, under such conditions, do not to all intents and purposes, amount to federal control in the states and of the states, so far as this particular form of education is concerned.

The subsidies come, not from the sale of public lands, over

which the federal government has entire power, but from the federal taxes, which are levied "to pay the debts and provide for the common defense and the general welfare" of the United States. "General Welfare" Appropriations

Clearly these expenditures can be justified only on the basis of the last clause, "for the general welfare."

No doubt agricultural education is, or may be, for the general welfare.

Very likely suitable training for particular vocations is for the general welfare.

But so is all education if properly conducted.

If, then, this "general welfare" clause warrants appropriations of federal money to maintain Agricultural Colleges, to provide for agricultural extension work, and to control vocational schools in the states, the same elastic clause also warrants federal control, under the guise of subventions, of any education and of all education. The state power to establish and conduct common schools, high schools, normal schools, universities, schools of any kind, becomes merely a concurrent power with the federal Congress. The reserved rights of the states become merely such as the Congress has not as yet seen it advisable to appropriate. Enormous Federal Usurpation

V. *The One Hundred Million Distribution Bills*

"The mind grows with what it feeds on." The various acts for the grant of federal money to states for agricultural education and for education in the mechanics art did not float down from the azure above, nor did they come wholly from the educational wisdom of members of Congress. In each case there was a lobby which was influential largely because it was widely distributed among the states. Each new assumption of Congressional power opened further vistas of possible approach to the federal treasury. The sources of federal income, too, are so remote from the ordinary taxpayer, are so insidious in their nature, that a grant from

the United States is likely to seem like a free gift of the gods.

Plainly if federal money can be given to the states for one sort of education it can be given for any. Naturally the next measure proposed was one for a generous distribution of the public funds among the states for the benefit of the common schools. To this end an industrious lobby was organized among the possible beneficiaries of the fund and the Congress was urged to enact generous legislation.

A Department of Education

For some time there had been pending a bill (e. g. H. R., 399, 64th Congress, 1st Session) to convert the bureau of education into a department, to be headed by a secretary who should be a member of the President's Cabinet. This appealed to many who were interested in education. It appeared to be a suitable recognition of an important phase of the national life. European nations as a rule have such a department, and visiting teachers from abroad are surprised to find in Washington a mere subordinate bureau. To be sure a bureau head does not necessarily change with administrations, while cabinet officers do. Still, on the whole the plan of a Secretary of Education in the President's Cabinet seemed rather desirable. and was generally favored by the teaching profession.

But for some reason the bill made little progress, doubtless because not enough people were so interested in its passage as to bring pressure to bear on members of Congress.

The Smith-Towner Bill, 1918–19

When the great war came on, lavish expenditures became usual, and the free use of federal powers was matter of every-day experience. These rather new circumstances made it easier to advance on the precedents of recent years and to draw up an elaborate plan for distributing federal money among the states for educational purposes. In October, 1918, Senator Hoke Smith, of Georgia, introduced in the Senate a bill (S. 4987, 65th Congress, 2d Session), "To create a Department of Education, to appropriate money for the conduct

of the said department, to appropriate money for federal coöperation with the States in the encouragement and support of education, and for other purposes." An identical bill was introduced in the House of Representatives by Mr. Horace Mason Towner, of Iowa, in January, 1919.

The bill proposed to transform the Bureau of Education into a Department with a Secretary at its head. Presumably the Secretary would have a place in the Cabinet. His tenure of office would be "like that of the heads of other executive departments"—in other words the Secretary would be a political officer, changing with changing administrations.

The President would have the power to transfer to the new department any other educational agencies already established by the general government. As some of these agencies, notably the Board of Vocational Education, were opposed to such transfer, it was perhaps better policy not to require unification in the bill, but to leave such matters to the discretion of the President.

The Department was to carry on investigations in various educational fields, and was to supervise federal educational coöperation with the states.

For the cost of investigation and of administering the Department there was to be an appropriation of $500,000 annually.

Then for the purpose of coöperating with the states in specified particulars, there was to be an annual appropriation of $100,000,000.

One Hundred Millions a Year

For the abolition of illiteracy there were to be expended three-fortieths of the above appropriation; for the Americanization of immigrants; three-fortieths, for equalizing educational opportunities among the states, twenty-fortieths; for the promotion of physical health and recreation, eight-fortieths; for teacher training, six-fortieths.

The reasons for these particular fractions did not appear in the bill.

No money was to be granted to any state unless for the same purpose the state should appropriate an equal sum.

To secure a share in the federal appropriation it would be necessary for a state to accept the terms of the act through its proper authority, and then to designate an educational authority within the state to coöperate with the Department.

To secure federal funds for any of the purposes designated, except the training of illiterates and immigrants, the state must have "a satisfactory system of preparing teachers"—satisfactory, presumably, to the Secretary of Education.

The Secretary was to be authorized to frame rules and regulations for carrying out the act. The state educational authorities were to be required to "present to the Secretary of Education plans and regulations for carrying out the provisions of the Act" within the respective states, "which plans whall be approved by the said Secretary of Education before any allotment or apportionment of funds is made to said State." In particular the state plans for teacher training must be laid before the Secretary and have his approval before a state could receive any portion of the federal funds.

Further, no part of the federal allotment could be used for establishing or maintaining the school plant—in other words, besides providing a sum for salaries and the like equal to the federal allotment, the state must also provide land and buildings needed.

Finally, each state must annually report to the Secretary, "Showing in such detail as he may prescribe the work done in said State in carrying out the purposes and provisions of this Act."

The bill might quite accurately be designated "A Bill to Ensure the Dominance of Party Politics in the Bureau of Education, to Provide for the Control of State Common Schools by the Federal Government, and for No Other Purposes."

The bill did not pass in the 65th Congress, and was intro-

duced in the 66th (May 19, 1919) by Representative Towner in the House. It was referred to the Committee on Education, which reported January 17, 1921 with amendments. The Bill of 1919–21

In the Senate Mr. Hoke Smith introduced a substantially identical bill (S. 1017) which was reported out from the Committee on Education and Labor, February 24 (calendar day, March 11) 1921, with amendments.

Some of the amendments are significant.

The original bill vested the President with power to transfer to the Department of Education any existing educational agencies of the federal government which in his judgment might seem appropriate to place there. This power was now given to Congress instead of to the President. It was understood that certain agencies would oppose the Bill otherwise, believing themselves able to prevent an action adverse to their wishes by Congress, but less able to influence the President.

A clause stricken out was one authorizing expenditure, for the promotion of physical education, "providing school nurses, school dental clinics, and otherwise promoting physical and mental welfare." To an innocent observer this clause would seem unobjectionable, and the purposes quite laudable. There however seemed to be apprehension of opposition from certain sources, should the clause remain. As the Senate report said: "It was never the purpose of the sponsors of the bill to in any way create or dictate or approve any particular system of medicine or surgery or to impose on the unwilling any such system."

The most striking amendment was this, as it appeared in the House bill. The original bill contained the proviso "That this Act shall not be construed to require uniformity of plans, means, or methods in the several States in order to secure the benefits herein provided, except as specifically stated herein." In lieu of this, the following was the proviso substituted: "Provided, that courses of study, plans, and State Control

methods for carrying out the purposes and provisions of this Act within a State shall be determined by the State and local educational authorities of said State, and this Act shall not be construed to require uniformity of courses of study, plans, and methods in the several States in order to secure the benefits herein provided."

As compared with the previous bill of October, 1918, the bill of 1919 further provided: "That all educational facilities encouraged by the provisions of this Act and accepted by a state State shall be organized, supervised and administered exclusively by the legally constituted State and local educational authorities of said State, and the Secretary of Education shall exercise no authority in relation thereto except as herein provided to insure that all funds apportioned to said State shall be used for the purposes for which they are appropriated " by Congress. These provisos with sundry omissions to the same end, were doubtless in deference to the rising public resentment at the increasing sweep of federal meddling with state affairs. As the Senate Report urged: "The bill in no way invades control by the respective States of the educational work in the States. . . .

Report of the Senate Committee on Education and Labor, 66th Congress, 3rd Session, Report No. 824, Feb. 21, 1921

"No measure could more sacredly preserve the constitutional authority of the States to control education in the States, so far as there is authority to control it. No criticism can be brought against this measure unless that criticism is equally just if made against the levy of taxes for public-school education."

The Senate Report further declares: "The constitutional authority of Congress to appropriate money to aid the States in educational work has been recognized from the earliest days of the Republic. The Articles of Confederation recognized the necessity of nation-wide contribution to education, and the Ordinance of 1787 declared: 'Schools and the means of education shall be forever encouraged.'"

These important changes in the $100,000,000 distribution

measure, with the validity of the protection of state educational autonomy, it will be proper to discuss later. Meanwhile it may be noted that the Smith-Towner Bill did not pass in the 66th Congress. New bills were brought into the 67th Congress early in the first session—by Mr. Towner in the House, April 11, 1921 (H. R. 7) and by Mr. Sterling in the Senate, April 27, 1921 (S. 1252).

The Sterling-Towner Bill, 1921

These bills were essentially the same as those of the preceding Congress—the creation of a Department of Education with a Secretary at its head, the transfer to that department of the Bureau of Education and of such other agencies as Congress might determine, and the encouragement of the states in the specified lines by the distribution among them of $100,000,000 from the federal treasury.

Further emphasis is given to state autonomy by a series of explicit stipulations. Perhaps the most emphatic is this, from Sec. 13: "All the educational facilities encouraged by the provisions of this Act and accepted by a State shall be organized, supervised, and administered exclusively by the legally constituted State and local educational authorities of said State, and the Secretary of Education shall exercise no authority in relation thereto; and this Act shall not be construed to imply Federal control of education within the States, nor to impair the freedom of the States in the conduct and management of their respective school system."

Also this bill provided for a National Council on Education to consult and advise with the Secretary of Education on subjects relating to the promotion and development of education in the United States. This body, approximately a hundred in number of members, was to include educational officials from the States, and fifty others, educators and laymen, appointed by the Secretary. The Council was to meet once a year for conference.

Failing of passage in the 67th Congress, substantially the same bill was introduced in the 68th—in the Senate (S. 1337)

The Sterling-Reed Bill, 1923

by Mr. Sterling, of South Dakota, December 17, 1923, and in the House (H. R. 3923) by Mr. Reed of New York, on the same date. The bill has not passed.

Some Comments on these Bills

The strenuous attempts at legislation distributing large sums of money from the federal Treasury to the states for certain forms of educational work has had, as seen above, an interesting history.

The logical development of acts for federal aid to state education, in such form as to insure federal control, was found in the original bill of Senator Smith, in October, 1918. The preceding bills of a similar nature, each extending the federal grasp on schools and school methods in the states, had been carried, with opposition on the whole rather feeble. But the extent of this plan was so great and so obvious that, in spite of the strong backing which it had there at once developed a wide public interest and some rather definite questions as to what was pending. How far was this sort of thing going? Was there any limit to federal intrusion into state control of its own affairs? Was the federal balance to disappear altogether? So far as education was concerned was the government at Washington to become a centralized power, the states gradually fading into faint echoes of a federal department?

The amended bills showed that the sponsors for this legislation had taken alarm and realized that there was a general awakening which would make success of the bills unlikely. Hence amendments were adopted frankly declaring the states supreme in educational policies within their own limits and converting federal grants into a mere modest beneficence.

P. 246

If, however, the field of education is wholly within the sphere of state reserved rights—"No measure could more sacredly preserve the constitutional authority of the States to control education in the States"—why should Congress meddle with it at all? Why not leave the states to manage their own affairs in their own way?

Further "Timeo Danaos et dona ferentes." In the light of previous legislation enacted and attempted, these lavish beneficiences of the central government may well be regarded with hesitation. The power of the purse is quite well known, and in the long run there would be an insidious, but effective, control from the source of the benefactions.

An Entering Wedge

Installation of President Kinley, p. 37 sqq.

The President of one of our leading state universities put some of the implications clearly in his inaugural address in 1921. Speaking of the fifty-fifty plan of appropriation, so-called, he said: "It is a fair proposition on its face, but its effects are wholly evil, and for these three reasons:

Dangerous Implications

"1. No state or university can withstand the pressure of public opinion in the face of the possibility of adding to its resources from the public treasury, even though in providing the offset fund, the amount will be charged against the institution and reduce thereby its budget for other purposes.

"2. In the administration of federal funds supplemented by this offset, the auditing agent of the institution passes not only upon expenditures of federal money but upon an equal amount of state appropriation. Now reason suggests and experience shows that when the policy of the institution as a whole and the policy of the federal department fail to agree, it is the former that must give way. The federal administration to that extent will dominate the policy of the state educational institution.

"3. This leads logically to a comparison of the educational policies likely to evolve in a university as compared with those likely to develop through the decisions of an executive department. On the one hand, in the case of a university, there is adequate and effective machinery for deliberately considering a new policy in all its relations and it may be assumed that when its faculties, its president, and its trustees have arrived at a conclusion, it is a fairly wise one, not only that, but policies can be readily changed if found unwise or with changing conditions.

"On the other hand, policies evolved through administrative decisions are not the result of discussion; they are based first of all upon bureaucratic interpretation of the intent of the law; next, upon the mass of office decisions that have been made in the various departments of the federal government; and finally, upon the individual slant of the particular person who happens to be detailed to review the records at any given date."

The speaker further points out that a state may have a well-defined policy of educational development—that the federal government may offer a considerable sum to encourage some other policy—that if the state is induced to accept, it very likely will be at the expense of the policy already adopted. Thus there would be an insidious, but none the less effective, federal control.

Dr. S. F. Capen: President Kinley's Inauguration, p. 25

Another educational expert on the same occasion said, referring to these fifty-fifty subsidies from the federal government to the states: "The autonomy of the States is not curtailed merely by bureaucratic orders from Washington. There is another still more important influence. Already a very considerable portion of State revenues is claimed for purposes designated by the Federal Government. Let the principle which we have been discussing continue to dominate Federal legislation for a decade or two longer and the major part of all State tax levies will be mortgaged in advance for the support of undertakings determined at Washington. By a gradual and unsuspected process of transition the respective functions of the Federal and State governments will have been changed. This is what fiscal coöperation with the States on the fifty-fifty basis really means."

President Eliot of Harvard, 1873

As long ago as 1873, at a meeting of the National Education Association, President Eliot, of Harvard University, discussed in his trenchant way a proposition for federal subsidies for education in the states: "Dr. McCook proposed that ninety million dollars public money be applied for upper

schools in the North and for upper and elementary schools in the South. Ninety millions would be only a drop in the bucket. . . . The one drop is a drop of poison. It demoralizes us and weakens the foundation of our liberty. It interferes with the carrying out of our destiny—the breeding of a race of independent and self-reliant freemen. . . . I know of no more mischievous, insidious enemy to a free republic than this habit of asking help in good work which we ought to attend to ourselves."

The President of a state university, the President of a university on private endowment, and an expert of the Bureau of Education, concur in their view of federal subsidies to education in the states.

The Senate Report (p. 246) says: "The constitutional authority of Congress to appropriate money to aid the States in educational work has been recognized from the earliest days of the Republic." The Senate Report

Has it? The authority of Congress over the public lands, and presumably over the proceeds of their sale, is founded on a constitutional grant, although even that has not been uncontested. But the authority to give the states money from taxes has by no means been recognized. This is what Henry Clay, himself far from being a strict constructionist, said would be "a flagrant usurpation." Ante 6 Clay's Works, 233

The Senate Report proceeds: "The Articles of Confederation recognizes the necessity of nation-wide contribution to education."

Do they? Where is the recognition found?

The Senate Report goes on to say: "The Ordinance of 1787 declared: 'Schools and the means of education shall be forever encouraged.'"

True, but this was plainly enough addressed to the states which it was expected would be formed from the Northwest Territory. In fact Ohio, Indiana, Illinois, Michigan and Wisconsin were so formed, and the eastern part of Minnesota

was included. Not a syllable of this educational mandate had any reference whatever to the federal government.

The Sources of this Attempted Legislation

The various bills for distributing $100,000,000 to the states as an educational subsidy did not emanate altogether from the altruistic enlightenment of members of Congress. Such subsidies have been urged on Congress for many years, year after year, Congress after Congress, usually by representatives of the educational profession.

Keith and Bagley, C. XII.

The National Education Association has long been active in attempting to secure federal aid for the work of the teaching profession. That body has all along favored a national university, strongly supported the Blair Bill—a bill which proposed to distribute $77,000,000 among the states for a series of years on the basis of illiteracy. The bill passed the Senate several times (1883–89) but failed in the House. The Association in fact has been on record as approving all the acts of Congress for distributing land, or the proceeds of the sale of land, or cash from the federal Treasury, among the states to aid education. It is hardly necessary to say that this Association and other organizations of teachers brought their case frequently and urgently before members of congress.

U. S. Bureau of Education, Circ. of Inf., No. 3, 1887

Cong. Rec., March 3, 1923, p. 5469

In discussion of the pending Sterling Bill (p. 247) a member of the House took occasion to say that the bill was recommended by organizations representing 25,000,000 citizens. Among these he cited: "The National Education Association, the General Federation of Women's Clubs, the National League of Women Voters, the Daughters of the American Revolution, the National Congress of Mothers' and Parent-Teachers' Association, the National Women's Christian Temperance Union, the Women's Relief Corps, the National Committee for a Department of Education, the National Sunday School Council of Religious Education, the American Federation of Labor, all Masonic organizations of national scope, the National Federation of Women's Clubs, and the American Library Association."

Keith and Bagley, pp. 141–2

Referring to the Smith-Towner Bill of 1918 (ante p. 242) it is said, "This bill was prepared in outline form by the Emergency Commission of the National Education Association during the spring and summer of 1918. . . . During the interval between March, 1919, and May, 1919, the bill was revised with the active coöperation of the Educational Committee of the Federation of Labor, and reintroduced in the Sixty-sixth Congress in May, 1919."

The amount of pressure brought to bear on members of both Houses of Congress by the eager and organized adherents of such measures is of course very considerable. Congressmen are accustomed to being deluged with form letters, emanating on the face of it from a single source. They count for little. But a serious movement urged by a large number of voters is to be considered with care.

Of course there are those who take the opposite view, and their opinions and reasons are well known. Some have been cited (p. 249 sq.).

In 1920 the American Council on Education laid the whole question of federal subsidies and cognate matters of proposed legislation before its constituent members with a carefully drafted résumé of arguments on both sides. The Council has not favored the federal subsidies.

A Better Use for a Hundred Millions

If the federal treasury can find a hundred million dollars a year beyond the present national budget, it would seem to a plain citizen that its first use should be to reduce the national debt and thus reduce federal taxes. The "encouragement" to the states in the various subsidy bills is after all encouragement to extravagance. The high cost of living is largely the high cost of government, and the federal government should indeed set an example for the states.

A Better Place for Education in the Federal Government

The federal government should not seek, directly or by indirection, to control education in the states. Doubtless the Bureau of Education, under whatever form it may be organized, could very properly act as an important source of in-

formation for the states on all educational matters. This information should be complete, all comprehensive and accurate. The Bureau would more probably keep out of party politics and could be on a more nearly scientific basis, by remaining a Bureau, somewhat analogous to the Bureau of Standards. There is no need for a Department of Education when there is nothing for the Department to control. But after all that is a minor matter, if no attempt is made to aggrandize the functions of the Commissioner, or of the Secretary, at the expense of rights which belong elsewhere.

The "General Welfare" Clause in the Constitution

The elastic "general welfare" clause of the Constitution is one which some hold to justify the expenditure of the taxes collected by the United States for educational purposes. Surely few things are more vital for the general welfare of the Republic than education and all that education implies. But is that a correct view of the Constitution?

Two views may be held as to the meaning of "the general welfare" as a proper object of raising taxes.

One may be that any expenditure for the general welfare is constitutionally valid.

If this view is correct it is difficult to find a limit to federal powers. Provided only that in the opinion of the federal legislature a given purpose is advantageous to the Republic as a whole, then expenditure of public money to attain that purpose is legitimate under the Constitution.

The common schools in every state are essential to the safety and prosperity of the Republic, therefore the Congress may distribute money among the states for these schools, or for the proper preparation of teachers, and may make such conditions attending the grant as to amount to virtual federal control.

Criminal administration is extremely important for the safety of society, and it is important that in every state such administration should be effective. Hence the Congress may distribute money among the states for model prisons or

prisons farm, accompanied by such conditions as to insure the adoption of federal ideas of prison management by the states.

There may, however, be a second interpretation—no appropriation from the federal taxes is valid under the Constitution unless, aside from other specified or plainly implied purposes, it is for the general welfare. But the sole fact that it is held to be for the general welfare would not be sufficient warrant for Constitutional validity.

Power of Congress to Dispose of "Property" of the United States

Of course there is another loophole for lavish expenditure under the Constitution. The Congress has the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Art. IV, Sec. 3, § 2). Money in the Treasury is property. Therefore Congress may dispose of it as freely as is done with the public land.

Whether Gouverneur Morris, when he moved this clause in the Convention (August 30, 1787) had any suspicion that the "property" in question could be construed to include the proceeds of taxes, warranted by a previous clause vesting in Congress the taxing power, may well be a matter of doubt. The particular subject before the Convention at the time he offered the motion was that of the disposition of the western lands. Various suggestions had been made, some of them relating to the admission of new states to be formed when the wilderness should be settled. One motion preceding that of Mr. Morris was offered by Mr. Carroll—"Nothing in the Constitution shall be construed to affect the claim of the United States to vacant lands ceded to them by the treaty of peace." Later Mr. Carroll withdrew this motion, offering another—"Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual States, to the Western territory." Mr. Morris succeeded in having this motion postponed in order to present the one first noted, as to the power of Congress over territory and

other property—Mr. Carroll's last motion being carried later, and in substance following the territory and other property clause in the final draft of the Constitution, the two being but parts of one whole (Art. IV, Sec. 3, § 2).

Curious Implications of Power

However, what the framers intended and what they succeeded in accomplishing, are not always identical. Nothing can be more certain than their definite conviction that they had locked and bolted the doors on fiat paper money. The first draft of a Constitution, reported out, August 6, 1787, by the Committee on Detail gave Congress the power "to emit bills on the Credit of the United States." On the motion of Gouverneur Morris the clause was struck out (August 16). In the debate "Mr. Ellsworth thought this a favorable moment, to shut and bar the door against paper money." Mr. Wilson said: "It will have a most salutary influence on the credit of the United States, to remove the possibility of paper money." Mr. Butler remarked, "that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power." "Mr. Read thought the words, if not struck out, would be as alarming as the mark of the Beast in Revelation." Nine states, including Virginia, voted to strike out the clause, and only two voted in the negative—two not voting.

Bills of Credit, Madison's Journal, Aug. 16, 1787

Under this date in his Journal of the Convention, Mr. Madison makes the following note: "This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the Government from the use of public notes, so far as they could be safe and proper; and would only cut off the pretext for a *paper-currency* and particularly for making the bills *a tender*, either for public or private debts."

Juilliard v. Greenman, 110 U. S. 421, 448

In spite of this clearly revealed intention with which the Constitution was drafted, in 1884 the Supreme Court held that "Congress is authorized to establish a national currency; either in coin or paper, and to make that currency lawful

money for all purposes." The process of intellectual gymnastics by which this conclusion was reached it is needless to discuss here—it is only pointed that it *was* reached, and that quite likely the Court would find it not difficult to hold valid the power of Congress to raise taxes and then to expend them in such benefactions or subsidies as may seem expedient.

The practical question therefore relates to that very expediency. Is it on the whole advisable to undertake to control the policies of states by federal subsidies? Further, is it after all in accordance with the essential nature of the Constitution? Are not these federal subsidies obviously in the main further means of destroying the federal equilibrium by building up a centralized government at Washington calculated to take over the local affairs of the States?

CHAPTER IX

A NEW POLICY NEEDED

The Services of Hamilton

Alexander Hamilton in the early days of the republic rendered services of value beyond estimate. In the Constitutional Convention of 1787, especially in its later stages, he was extremely useful. In the New York Convention of 1788 his influence went far to secure what at one time seemed beyond hope, the ratification of the new Constitution by the great state on the Hudson. As the first secretary of the Treasury his genius placed the young government on a solid financial foundation. He was one of the great founders of liberty controlled by law—of a federal republic without despotism and without discord.

But among many sincere and large-minded people, as well as among demagogues, Hamilton was suspected of a design to establish a monarchy. He had no such design, and to us the imputation seems grotesque. But there were reasons, after all, for doubt by those who could not know all the facts. Hamilton had little faith in the intelligence and public spirit of masses of men. He had seen so much of the real nature of many of the revolutionary politicians, and of crooked contractors for supplying the continental armies, he had found it so difficult with all patience to make plain to the multitude public needs which to him were clear as noonday, that his quick mind recoiled at the extremes of political democracy.

Madison's Journal, June 18, 1787

Further, his idea of a proper frame of government was frankly developed to members of the Convention of 1787. He would have had a chief executive designated for life, with large powers—a Senate, with members representing prop-

erty, also designated for life, or for good behavior—a popular lower House—a federal negative on all state laws, state governors appointed by the federal government. This would have been a centralized government with a vengeance—a monarchy in all but name and heredity—and the states would have become dependent provinces.

With such views known to belong to Hamilton, and to many of his colleagues as well, it is no wonder that Jefferson and Clinton and Madison were able to build up a party based on decentralization and the preservation of the Constitutional rights of the states.

The crying need of the young republic in the last decade of the eighteenth century was a firmer union—a strong federal government. The adoption of the Constitution, and its initiation by the Hamiltonian Federalists, met this need as could have been done in no other way. It was vitally necessary to have the new government organized and set on its way by Washington and Adams and Hamilton, rather than by Jefferson and his group. The Federalists laid firm the foundations—and laid them for all the decades since.

The Contribution of Marshall

It is also matter for gratitude that for a long time the Supreme Court remained under the control of Marshall and his Federalist colleagues—long after the Congress and the Presidency fell into the hands of the party of Jefferson. Administrative policies mattered less than the fixing of the basis of law for the new and uncertain structure of the federal government. The long series of Marshall's decisions made permanent the effective nature of that government. We owe our continuance as one nation, then, rather than as several discordant little states, first of all to three great forces—the Constitutional Convention of 1787, the administrative measures of Alexander Hamilton, and the juristic interpretations of John Marshall.

Still the success of Jefferson and his party in securing power in 1901 was on the whole advantageous. It is al-

The Need of Jefferson to the Republic

together likely that no such policies of arbitrary government as the Republicans of that day feared would have followed from a continuance of the Federalists in office; and indeed it is quite probable that the republic would have been spared some definite misfortunes had Federalist methods of national defense and foreign policy been followed some years longer. On the whole, however, the Republican administrations represented a real apprehension of danger felt by great masses of the people, and such a thoroughly Federalist measure as the annexation of Louisiana was almost a matter of course when adopted by Jefferson, while it might have led to a dangerous commotion had it been carried out by Adams. The change of parties, in short, provided a safety valve for popular excitement without in the main involving many material changes in the methods of the federal government.

To be sure, Jefferson's fantastic notions of the proper means of national defense made us helpless victims of the warring powers of Europe, abused with impunity by both, and finally driving us in 1812 into a war for which we were wholly unprepared and which accordingly was on the whole disastrous. Had the Federalist policy of 1797 in making ready armed ships and troops, been followed in 1807, either there would have been no war with either France or England, or had one come it would have been crowned with success. Jefferson's foreign policy was such that we had just cause for hostilities with each of those nations and were ready for war with neither.

However, the overthrow of Napoleon brought peace to the world and our foreign difficulties came to an end.

The apprehension of a centralized autocracy at Washington, never well founded, disappeared with the election of Jefferson, and the state rights doctrines so strenuously urged in the course of the political contest of 1800 came to be taken for granted as the American republican gospel. Naturally as time passed when emergencies came which gave especial

significance to the particular rights of the states these doctrines were carried further and further. Ultimately they reached the ground of nullification and secession—nullification as bearing on protective tariff laws and secession as resulting from the anti-slavery movement.

The question came to be one of the existence of particular alleged rights of the states.

Nullification

Did each state have a right under the Constitution to decide for itself whether a specific act of Congress was unconstitutional and if so null and void within the state limits? Calhoun said yes. Jackson not only denied the right but proposed to enforce his view by the army and navy, and he would have preferred such a settlement to that of Clay's Compromise of 1833. By reason of that Compromise the question was left unsettled.

Secession

Did a state when it should see fit under the Constitution have a right to withdraw from the Union and to set up a separate government? South Carolina and her sister states said yes. The remaining states supported President Lincoln in opposing secession by force of arms, and secession was defeated. No amendment to the Constitution was adopted thereafter denying the right of secession—the claim of right was settled adversely on the battlefield, and later embodied in a decision if the Supreme Court.

Texas v. White, 7 Wall. 724

Thus excessive centralization, apprehended with or without reason by large numbers of the people soon after the new Constitution went into effect, was made impracticable by an adverse election in 1800. Excessive rights claimed for the states—rights which if exercised would have destroyed the Union—were negatived by Civil War.

National Power Increased by the War for the Union

Of course the long and arduous struggle to maintain the Union inevitably tended to strengthen the central government and to weaken the bonds of state allegiance. It was the latter which drew many Southern men who loved the Union into war against it, it was passionate attachment to

the Union as a nation which led many thousands of others to the battlefield. "State Rights" came to be a discredited term—it perhaps being forgotten that the whole contest was by no means about state rights as a whole, but merely about certain specific rights claimed by some states.

State Rights

There remains under the Constitution a great body of rights of the states, rights on which the federal government has no ground for encroaching, and which are essential to the preservation of the republic as one of federal character, which is its most valuable, and should be its most cherished, principle. There is not much of importance in "indestructible States" if it is little but their form which remains, if their vital powers pass to the central government.

Aggrandizement of the Federal Government

The steady drift now for a century, with increasing speed in the last few decades, has been in the direction of adding to the powers of Congress and conversely of stripping the states of their reserved powers. The machinery of the central government has grown enormously. A great central bureaucratic system has grown up and is steadily expanding. An army of civil servants has been provided, and already a beginning of a system of civil pensions has been made. There is a constant series of organized campaigns for additions to the federal mechanism—new departments, new functions, new taxes. People at large are sluggish in opposition—it is far easier to organize and push efforts for immediate self-interest than for more remote and more general welfare. The relation of taxes to the cost of living is obscure to most, and the source of federal taxation is so far away that few realize what is going on in Washington. There may be great noise about a few measures—but the incessant additions to the federal power and to the federal governmental machinery are noiseless and insidious—it is only by comparing facts some years apart that the nature of the growth becomes evident.

The last Report of the United States Civil Service Com-

mission gives the number of employees in each branch of the Federal Executive Civil Service June 30, 1924, as 554,986; the number, June 30, 1916, before the United States became involved in the great war, was 438,057. These totals for a variety of reasons do not include considerable numbers of federal employees—for instance 36,100 clerks at fourth class post-offices, because not paid by the government. Still, in the figures given there was an increase of nearly 27 per cent in the eight-year period. The Federal Civil Service

It is estimated that the number of tax-supported officials, active and pensioned, throughout the nation, federal, state and local, is 3,400,000, and the salary bill for the support of the same is about $3,820,000,000. One out of every 12 wage earners upwards of 16 years of age is on a public payroll. Within the last 20 years the number of the tax-supported public officials has doubled. The population has not doubled, nor has the national wealth. Research Report, No. 64, National Industrial Conference Board, pp. 15–19.

The chief demand on federal taxes, of course, is the necessary provision for the national debt—and the national debt in the main represents the cost of past wars. When the United States entered the great war there was a debt of about a billion dollars. At the end of August, 1919, the maximum of federal debt was reached, approximately $26,600,000,000. Since that time there has been a steady process of reduction, until now it is about $21,000,000,000. The National Debt

The reduction of debt means the reduction of interest charges, and that means a reduction of taxes. By the policies of national economy now rigorously enforced by the administration at Washington the tax rate has been materially cut, and bids fair to be cut still more. Federal taxes per capita for the last few years as are follows: 1920, $54; 1921, $45; 1922, $32; 1923, $28.

The reduction of taxes is not always easy, as there are so many forces clamoring for the public funds. The adoption of the Budget system has made the whole matter much more Federal Budget Difficulties

rational than for long years was possible before that time. But the eager pressure for appropriations beyond the budget continues, and Congress is beset with strenuous applications. In the spring of 1924, for instance, there were bills pending which would have called for expenditures of at least $600,000,000 beyond those contemplated in the budget. There was a proposal to add $125,000,000 to increase the salaries of postal employees, without corresponding provision for increased postal income; a proposal to give a bonus to soldiers of the late war, calling for $100,000,000 to $125,000,000 annually; $50,000,000 more for pensions; upwards of $240,000,000 of added cost for the Veterans' Bureau; $75,000,000 for good roads; perhaps $200,000,000 for farm relief. To these might be added $100,000,000 more if the Towner Bill for an educational subsidy were included. These are examples of the sort of thing which every year come to Congress, usually with strong political backing, often with a special appeal to sympathy, but which in their total would enormously increase taxes, and hence the cost of living for everybody.

State Extravagance

The influence of federal fiscal policies on those of states and localities is very potent. Extravagance at Washington tends to increased extravagance throughout the Union, while a steady and remorseless policy of retrenchment can hardly fail of effect in the states. A few words from the budget message of President Coolidge of December, 1923, will illustrate. He said: "We are familiar with the fact that the larger part of the tax burden arises nor from the exactions of the federal government but from the governmental costs of the states and municipalities. President Harding, in his address on taxation and government costs at Salt Lake City last June, pointed out that for the year 1922 approximately sixty per cent of all taxes collected throughout the nation were for the states, cities, and other local taxing bodies. It is therefore highly desirable that an example of determined and insistent economy be set by the Federal Government for the sake of its in-

fluence upon every body which possesses the authority to levy taxes. I am firmly persuaded that if the National Government will reduce its expenditures and its levies under the program which is presented to you herewith, it will have a highly salutary effect in inducing greater economies in all other departments of public taxation."

State Taxation Increasing

The enormous local taxation, it is true, has been growing steadily, while that of the federal government has been diminishing. The per capita federal taxes have been noted above for a few years past. The per capita taxes for states, cities, and subordinate localities during nearly the same years, are as follows: 1918, $20; 1919, $27; 1920, $30; 1921, $36; 1922, $38.

The total of all state and local taxes in 1903 was $861,000,000. In 1913 that total was $1,526,000,000, and in 1922 it was $4,147,000,000.

That is not all. Not merely are states and local areas greatly increasing their annual expenditures, but at the same time they are steadily increasing their bonded indebtedness. In 1913 the total of all such indebtedness was $4,179,000,000. In 1924 it had reached 10,821,000,000. An increase of interest charges —to say nothing of provision for a sinking fund— means an increase of taxes and an increased cost of living for everybody. A few illustrations may serve to make this clearer.

In 1913 the total debt of California was $10,098,500. In 1922 the state debt of California was $75,964,500.

In 1913 the state debt of Oregon was $653. In 1922 it was $50,759,020.

In 1913 the state debt of Pennsylvania was $142,160. In 1922 it was $50,658,320.

In 1913 the state debt of Maine was $700. In 1922 it was $11,283,300.

The above are merely state debts, and do not include the great city, county and other local bonded obligations.

Federal subsidies to the states by no means lessen the bur-

Federal Subsidies to States

den of state taxes—on the fifty-fifty basis they usually increase them. Also they lead the way to more and more expensive projects for state expenditures.

In the fiscal year ending June 30, 1924, the total payment by the federal government on account of state subsidies was about $145,000,000.

The purposes and amounts of the principal subsidies during 1924 are shown in the following table:

Support of agricultural colleges	$ 2,550,000
Support of experiment stations	1,440,000
Coöperative agricultural extension work	5,880,000
Vocational education	5,188,952
Industrial rehabilitation	551,265
Aid for highway construction	63,375,000
Forest roads and trails	39,000,000
Forest fire prevention, etc.	1,743,202
Maternity and infant hygiene	847,536
Prevention and control of venereal disease	93,627
State fund under mineral leasing act	2,787,411
State fund under national forest act	1,321,422
State fund from sale of public lands	17,008
State fund under water power act	2,063
National guard	19,466,889
* Total	$144,264,373

It is one of the glories of the proponents of federal subsidies that thus advantages are equalized—the richer states help out the poorer. A brief analysis makes this quite plain.

New York pays nearly 25 per cent of all federal taxes—$690,415,425 in the fiscal year 1925. It received from the federal Treasury $4,020,445—a bit over 5 per cent of the $145,000,000 disbursed as federal aid.

* Subsidies paid to the states through the department of agriculture for fighting white pine rust, the European corn borer, gypsy and brown tail moths, etc., bring this total to nearly $145,000,000.

North Dakota paid in that year $1,282,838, and received $1,142,382. Nevada paid $761,490, and received $885,759. Illinois paid $214,840,722, and received $3,390,701. Ohio paid $153,524,832, and received $3,026,236. Pennsylvania paid $269,688,619, and received $3,796,118.

So far as these contributions are for national objects, like the national guard, they are quite legitimate. So far as they are for local objects, they are enforced beneficences.

The whole policy of subsidies to the states is discussed by President Coolidge in his budget message of December, 1924. He says:

"I am convinced that the broadening of this field of activity is detrimental both to the federal and state governments. Efficiency of federal operations is impaired as their scope is unduly enlarged. Efficiency of state governments is impaired as they relinquish and turn over to the federal government responsibilities which are rightfully theirs. I am opposed to any expansion of these subsidies. My conviction is that they can be curtailed with benefit to both the federal and state governments."

A Change of Fundamental Policy

What is needed now is not an extension of the political policies of Hamilton, but a recurrence to those of Jefferson. As has been seen, the whole tendency of the decades since the Civil War has been, by changing the organic law, by statutes of Congress, and by administrative methods, to encroach largely on the reserved powers of the states—to add to the authority of the federal government—to build up a great central bureaucratic system—with eager grasping always for more and more officials. Meanwhile surplus sums in the Treasury are distributed among the states as subsidies, thereby increasing the federal influence over the states, and lessening the virility of state local life.

A Twentieth Amendment Suggested

There should be a Twentieth Amendment to the federal Constitution. It should simply repeal all amendments following the Fourteenth.

Perhaps some greatly desired policies would be very slowly adopted by all the states. Perhaps some of them might never be adopted by all the states. But liberty is more precious than any of them, and there should be room in our federal republic of indestructible states for a wide variety of policies. The uniformity which is freely adopted is wholesome. An enforced uniformity is of the essence of despotism.

The Constitution Flexible

It should be remembered that the Constitution is by no means an inflexible body of law, belonging to a past age and almost unalterable when out of date. It was enacted by the states in 1787–88. It can be changed by the states at any time. It has been changed more than once, and experimental changes, when proved inadvisable, can be modified or rescinded.

A Constitution of Customs?

It is held by some that customs which have developed in our system of government are themselves a part of the Constitution—that we have in fact therefore in large measure a Constitution of precedents, like that of England. The methods followed by the presidential electors, the president's cabinet, the political party system, and many others, are cited as in fact constitutional in essence.

Is it not, however, a better statement of the American system of government that the Constitution is only the body of laws actually enacted by the states? It consists, then, only of the original document and its amendments.

The Meaning of the Constitution

The meaning of the Constitution is a quite different matter, and is determined by interpretations by the Supreme Court and by precedents of legislative and administrative action. The Court may change its mind—it has done that—the Congress may alter any of its policies, no matter how long they have been in vogue—the President may decide that meetings of the heads of departments which it has become usual to call the cabinet are needless afflictions—all these changes are under the Constitution as it is understood, and are by no means of its substance.

Discretion in Law Making

As the Constitution wisely was planned with as little detail as seemed practicable, it is in fact adapted to many changing conditions in the unfolding life of the Republic. If quite new conditions seem to require an alteration or an addition to the organic law, such change can be effected by the orderly process of enacting an amendment by the states. But in adopting such an amendment it would be well to bear in mind the radical difference between two classes of laws—such as are almost automatically put in force by the mere existence of law courts, and such as require to give vitality a general acquiescence of the people. The title to property might be an illustration of the first, as is the case with slave property under the thirteenth amendment. Certain political and social rights or obligations, too, may be created by law while non-existent in fact, as is plainly shown by the fifteenth amendment and by not a few futile statutes.

Preserve the Liberty of the States

But whether by constitutional amendment, by interpretation of the Constitution, or by statutes of Congress, the time has come to realize that we have gone far enough in the direction of a centralized federal bureaucracy at Washington. We need to cherish, and to cherish scrupulously, the local liberty of our states. The Constitution was ordained in order to "Secure the blessings of liberty to ourselves and our posterity."

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